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The Madras Law Journal

VOL. XVIII.] DECEMBER, 1908. [PARTS 23 & 24.

## BAIL.

(*Continued from p.* 305.)

*Bail After Verdict*—Ordinarily there can be no bail after a conviction by a jury, though sentence has not yet been passed. Thus, in a murder case, where the verdict was doubtful, and the judges did not agree upon it, the Court, holding the matter in advisement, refused to bail the prisoner in the meantime—*Rex.* v. *Morgan.* [1] In another case of misdemeanour, where a verdict had been rendered against the defendant, and the Court was taking time to consider whether the conviction was right and what should be the sentence, Lord *Kenyon* said that unless the prosecutor consented to the defendant's remaining out on bail, it was a matter absolutely of course that he should be committed: the Court had no discretion to exercise, and the practice was too well settled to admit of argument—*Rex* v. *Waddington.*[2] Still, though the Common Law doctrine seems thus absolute, the meaning appears simply to be, that the judicial discretion must be strongly moved to induce it to allow bail between the conviction and sentence, even in a case of misdemeanour. But where one was convicted of libel, and was sick, the Court said: "The offence is so great that an adequate punishment may endanger his life, and to lessen the judgment would be an ill-precedent; therefore bail him for the present, and we will give judgment when he is better"—*Rex* v. *Bishop.*[3] This doctrine prevails in England at the present day, and is accepted as sound law in the United States, though after sentence, if the prisoner be sick, bail will not, therefore, be allowed him especially in the case of a very high crime, if the confinement does not aggravate his sickness—*Wyndham.*[4]

1. (1688) 1 Bulst. 8'.
2. (1800) 1 East 143 (159).
3. (1815) 1 Stra 9.
4. (1615) 1 Stra 2.

But if his life is in danger from the imprisonment, or in some cases, if his health is poor and is injured thereby, this will furnish ground more or less strong according to the circumstances for admitting the prisoner to bail—*Aylsbury*[1]; *Jones*[2].

Even in capital cases, it was held in *Exparte Banks*,[3] a person indicted for murder is entitled to bail, unless the Court is of opinion, on the evidence adduced, that he is guilty of murder in the first degree. And if the Circuit Court refuses, the evidence may be set out in exceptions and application be made to the Supreme Court. See also *Exparte Bryant.*[4] This was on a construction of the words of the Constitution and the Code of Alabama. But our own case, in 10 C.W.N. 1093, has gone no less far.

*Presumptive Innocence.*—It is a basic principle of criminal jurisprudence, that since, for other purposes, a man charged with a crime shall be presumed to be innocent until the finding of a jury, and the judgment of the Court rendered upon the finding fix the alleged guilt legally upon him, the same presumption shall also prevail when application is made to the judicial discretion for bail. If, therefore, it is sufficiently shown that the appearance of the defendant to answer to the demands of the law can be made sure by bail, it is the accepted doctrine that bail should be accepted, thus postponing, in effect as well as in name, the punishment until the judgment of the Court is formally rendered.

"We may hope" said *Parsons* J. in *Sadasiv's Case*,[5] "that Magistrates will always be lenient to accused persons, at any rate until they are convicted."

Remembering how recklessly and how easily false charges are made and supported, the Magistrate will be reluctant to detain men in custody unnecessarily, particularly when he reflects on the one good and many evils of preliminary incarceration—*Ind. Jurist* (1893), 84. Our Magistrates would do well also not to forget that there is nothing to limit the operation of S. 496, Cr. P. C., to a period anterior to the hearing—*Cocha Rai.*[6]

*Bail by Police.*—The jurisdiction given by the Code to Police officers in admitting to bail persons arrested or detained without

1. (1697) 1 Salk. 103.
2. (1813) 3 Wash. C. C. 224
3. (1856) 28 Ala. 89.
4. (1859) 34 Ala. 270.
5. (1896) I. L. R. 22 Bom. 549.
6. (1874) 6 N. W. p. 366.

a warrant is similar to that exercisable by Magistrates. Much of the above observations would thus apply to Police officers. The powers are expressly limited to an officer in charge of a Police station. Powers are also given him of discharging such a person on his executing a bond without sureties, conditioned on his appearing at the time and place mentioned therein, and continuing so to attend until otherwise directed by the said Police officer.

Section 54 of the Code of Criminal Procedure gives to Police officers, all and sundry, the power of arresting without an order from a Magistrate, and without a warrant, persons concerned in cognisable crimes, or possessing implements of house-breaking, proclaimed offenders, suspected receivers, persons obstructing Police officers in the execution of their duty or escaping from custody, deserters, extradited offenders and misbehaving ex-convicts. The power is discretionary, and should not be exercised for petty bailable offences, especially where there has been delay in lodging the complaint. Such arrest would surely be advisable where there is likelihood of absconding or risk of the commission of further offences. A Police officer to whom a complaint of a cognisable crime is made, ought, if there be any circumstances which lead him to suspect the information, to refrain from arresting persons of respectable position, leaving it to the complainant to go to a Magistrate and convince him that the information justifies the serious step of issuing warrants of arrest. Arrests may also be made with a view to the institution of proceedings under S. 109, Cr. P. C. The power given by S. 55, Cr. P. C., should be exercised only when the officer in charge of a Police station has reason to apprehend that serious harm will result from the person's being at large, before he is able to go to a Magistrate competent to deal with the matter under S. 12. Persons so arrested should always be given the option of release on suitable bail—*Daulat Sing.*[1] An officer in charge of a Police station will always release on bail a person arrested or detained by him without a warrant, if such person is not accused of a non-bailable offence (S. 496, Cr. P. C.) If again, in the course of an investigation into a non-bailable offence, such Police officer has no reasonable grounds for thinking that the person accused of the offence has committed it, but that there are sufficient grounds for a further inquiry into the

1. (1891) I. L. R. 14 A. 45.

guilt, he may release such person on bail or on personal recognisances (S. 497, Cr. P. C.). A Police officer making an arrest without a warrant should, without unnecessary delay, take the accused either to the officer in charge of a Police station or to a Magistrate having jurisdiction in the case, for the purpose of admitting him to bail. The period of twenty-four hours is the limit of detention in custody by the Police, save under a special order obtained from a Magistrate under S. 167. Detention even for twenty-four hours is permissible only under exceptional circumstances. So on the appeal of a Police officer convicted of wrongful confinement it was held that in no case is a Police officer justified in detaining a person for one single hour except on some reasonable ground warranted by the circumstances of the case—*Suprosonno Ghosaul.*[1] Even with an order from a Magistrate, detention in Police custody cannot, on the whole, exceed fifteen days. The Magistrate, again, is required to record his reasons for authorising a detention under S. 167, Cr. P. C. This means that there should be some grounds for believing that the investigation will be properly assisted by the presence of the accused with the Police officer. Before an order for detention in Police custody is made, the accused must be placed before a Magistrate. It will be for the Magistrate in each case to consider what the term of such detention should be. It should not necessarily be ordered for the full term. Where the period has been exceeded, proper notice should be taken of the Police officer concerned. In an action for damages, however, express malice will have to be established.

If upon an investigation under Chapter XIV of the Code of Criminal Procedure no sufficient evidence is found against the accused and no reasonable suspicion attaches to him to justify the forwarding of the accused to a Magistrate, the investigating officer, being an officer in charge of a Police station, will release the accused, if in custody, on his furnishing bail or on his personal recognisance for his appearance, if and when so required, before a competent Magistrate. If there is reasonable ground of suspicion or sufficient evidence against the accused, such officer will, in the case of a non-bailable offence, send the accused in custody before a competent Magistrate, and, when the offence is bailable,

1. (1866) 6 W R. Cr. 88.

will take security from him for his appearance before a Magistrate (Ss. 169-170, Cr. P. C.). It must be remembered that in no case would a person, arrested by a Police officer, be discharged except on his own bond or on bail, or under the special order of a Magistrate—S. 63, Cr. P. C.

*High Court and Court of Sessions.*—The High Court and the Court of Sessions are vested with unlimited jurisdiction in the matter of bail. The law seeks no way to define the powers of the superior Courts. "The High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail."—S. 498, Cr. P. C. The limitations placed by S. 497, Cr. P. C., on the jurisdiction of the inferior Courts do not apply, and even in a case in which the guilt of the accused is well nigh established the superior Courts would admit him to bail at any stage of any proceeding if assured that he will not avoid a fair trial by absconding. The Code gives a discretion but provides no tests. The discretion is absolute, except that it has to be exercised judicially. The regulative canons have been stated already. It is now too late in the day to descant on the impropriety of importing principles of English Law to supplement the bare provisions of the Code. With the greatest respect for their Lordships I am constrained to say that I cannot agree in the soundness of the dicta in *Raja Narendra.*[1] The judgment in terms deprecates the examination of English rulings as being dubious guides in the interpretation of an Anglo-Indian Code. It is loth to admit that in exercising its discretion under S. 498 of the Code, the High Court should confine its attention to the question whether the prisoner is or is not likely to abscond, stating that there may be other circumstances which may affect the question of granting bail. What these considerations may be, the judgment does not pretend to indicate. Nor are we told what part of the Code they are drawn from. There is no avoiding the position that in the absence of a clear provision in the Code, a rule of English law founded on substantial justice might well be looked up to as a safe guide for our Courts. S. 497 provides a test for the inferior Courts. And it is a safe provision too. In capital cases it is the supreme test, for a man will give all he hath for his life. The superior Courts would look at the record to ascertain whether the

1. (1908) 13 C. W. N. 43.

sworn evidence raises a presumption of guilt. This is but one among many tests, and the superior Courts are not fettered by the provisions of S. 497. They would look at it only as raising a strong presumption that the prisoner would be likely to abscond. This and the other considerations indicated above would be adverted to merely to estimate the security of the prisoner's taking his trial. If that is secure, the other considerations would not weigh at all. This can be ascertained from the position of the prisoner in society, his stakes in the country, or in some cases from his lofty personality. All these tests, allow me to reiterate, are for the purpose of ascertaining whether, having regard to the ordinary course of human conduct under like circumstances, the accused is likely to abscond. The judgment is further open to objection as granting conditional bail—*Surendro*[1]; *Mohesh*[2]; *Gopinath.*[3] But *volenti non fit injuria.* The only thing that this case decides is that unreasonable delay in bringing the offenders to justice would afford a ground for granting bail. The statement of the provisions of S. 497 in this judgment is also misleading, for the Legislature is careful to make the granting of bail the usual affirmative and the denial under the special circumstances the exceptional negative. Forthe latest and most luminous exposition of the law on the subject I refer my readers to the memorable dicta of *Mitra* J., in the matter of *Jamini Mullic.*[4] They can also direct that the bail required by a Magistrate or by an officer in charge of a Police station may be reduced. They may bail a prisoner convicted by themselves where leave has been granted, under S. 41 of the Letters Patent, to appeal to the Privy Council.

In America, the superior Court has power to bail in all cases, and will ordinarily exercise it in favour of the prisoner, in cases not capital—*State* v. *McNab.*[5] It may permit bail to be given at any time down to the final execution—a discretion to be exercised according to the circumstances of the particular case—*Corbett.*[6]

I shall now advert briefly to the foundations of the jurisdiction of the High Court as to bail. The High Court exercises in this matter the powers of the old Supreme Court, being the same

1. (1870) 13 W. R. Cr. 27.
2. (1870) 13 W. R. Cr. 13.
3. (1886) 10 C. W. N. 82.
4. (1908) 13 C. W. N. 51.
5. (1849) 20 N. H. 160.
6. (1858) 24 Ga. 391.

as those available to the Queen's Bench Division of the High Court of Justice in England. The jurisdiction is founded on (1) the Charter Act and (2) the Letters Patent. The powers of the Queen's Bench Division will be found in 36 and 37 Vict. C. 66., Ss. 16, 33 and 34 read with S. 19 of the Judicature Act, 38 and 39 Vict. C. 77. The High Courts of Fort William, Madras and Bombay may, within the limits of their Ordinary Original Civil jurisdiction, that is to say, within the Presidency Towns, issue (3) directions in the nature of a Habeas Corpus—S. 491, Cr. P. C. As a Court of appeal (4) the High Court may admit an appellant to bail under S. 426 of the Code. Similar powers are exercisable in revision, (5) under S. 439. The extent of the jurisdiction is indicated (6) by S. 498, Cr. P. C.—vide *Manikam.*[1]. The Criminal Law Amendment Act takes away from Magistrates the power to bail in cases specified in the schedule, but it seeks no way to affect the jurisdiction of the superior Courts which would continue to grant relief on principles indicated above.

*Nature of the Jurisdiction.*—The case of *Jamini Mullic*[2] raised an important question as to the procedure to be adopted in case of a difference of opinion between two judges of a Divisional Bench of the High Court. The question resolves itself ultimately into one regarding the nature of the relief granted by the High Court on an application for *bail.* For even conceding, though the point is still open to question, that in the matter of an appeal or of a revision S. 429 and S. 439 of the Criminal Procedure Code supersede S. 36 of the Letters Patent of 1865, and though the High Court may revise every order of a Subordinate Criminal Court, the fact has yet to be faced that in the matter of bail the High Court exercises a jurisdiction essentially original in character, being concurrent with that of the trying Magistrate. The jurisdiction is conferred by S. 498 which also indicates its extent. There being no provision for a case of this description in the Code, S. 36 of the Letters Patent would govern.

*Bail by the Court of Session.*—Similar unlimited jurisdiction is conferred by the Code on the Courts of Session (S. 498). Bail may also be granted by a Court of Session pending an appeal thereto (S. 426). While making a reference under S. 307 or S. 438, Cr. P. C., a Sessions Judge may grant bail where he either

1. (1882) 6 M. 68. 2. (1908) 13 C. W. N. 51.

disagrees with the jury or recommends that a sentence be reversed or altered.

In extent, the jurisdiction of a Court of Session, in this matter, is equal to that exercisable by the High Court, and is not touched by the limitations contained in S. 497 of the Code of Criminal Procedure. The powers are available even before the case is sent up for trial—*Ebrahim Ahmed.*[1]

*Bail Bond—Forms.*—Before any person is released on bail or released on his own bond, a bond for such sum of money as the Police officer or Court, as the case may be, thinks sufficient, shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties, conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the Police officer or Court, as the case may be—S. 499 (1), Cr. P. C.

Form 25 of Schedule V, Cr. P. C. is the form of recognisance to be entered into by bail on a preliminary inquiry before a Police officer (under S. 169, Cr. P. C.)

Form 42, of Schedule V of Cr. P. C. is the form of bail-bond on a preliminary inquiry before a Magistrate, under the provisions of Ss. 496—499, Cr. P. C.

For the allied forms of warrants, &c., see forms No. 44 to 53 of the Fifth Schedule to the Code.

Bail-bonds in Criminal Cases and recognisances for personal appearance or otherwise are exempted from Court-fees—Act VII of 1890, S. 19, Cl. 15.

Section 513 of the Code of Criminal Procedure authorises a Police officer or Court to accept a deposit of a sum of money or Government Promissory Notes to such amount as the officer or Court may fix, in lieu of executing a bail-bond or recognisance.

Where the personal attendance of an accused person is dispensed with, a recognisance bond, if deemed necessary, should be taken from him and not from his agent, though he may appear by agent—*Lallabhai.*[2]

*Estreat.*—If the condition of a recognisance entered into either by a party or by his sureties be broken, the recognisance

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1. 7 Burma 86.
2. (1868) 5 B. H. C. R., Cr. Cas. 64.

may be forfeited, and on forfeiture, the obligee becomes debtor to the Crown for the sums in which they are respectively bound.

The Court has a discretion as to whether or not to order an estreat of a recognisance. In *R.* v. *Sangiovauni*,[1] an estreat of the recognisances of sureties for a person committed for trial had been ordered on his failure to surrender. *Fulton*, Recorder, directed that the estreat should not issue, on being satisfied that the sureties had taken all reasonable steps to secure the attendance of the defendant. On finding that he had left for the United States, they had informed the Police and had telegraphed at their own expense to have the defendant detained on arrival. In consequence of their action he was not allowed to land and was forced to return in the ship; but the ship being a Belgian vessel it took him to a Belgian port.

No bail bond or recognisance can be forfeited or estreated without the order of a Court or Judge, nor unless an order or notice has been previously served calling upon the parties bound by such bond, to pay the penalty thereof or to show cause why it should not be paid.

*Procedure for Estreat.*—The course prescribed by the section takes the place of the cumbrous proceeding by *scire facias*, which is in most cases necessary in England before estreating recognizances. In this proceeding the defendant, who has entered into the recognizance, has an opportunity of pleading to the *scire facias* and of thus raising the question "whether such bond has been forfeited," and upon the issue raised by that plea, a trial takes place, at which evidence is gone into precisely as in a civil suit. Upon a fair construction of S. 514, a Magistrate is not justified in forfeiting a recognizance under that section unless the party sought to be bound has had an opportunity of cross-examining the witnesses produced for satisfying the Court that the bond has been forfeited. The Magistrate must record the grounds of such proof. There must be proof, in the ordinary legal sense, that is, evidence on oath to ground the Magistrate's proceeding under the section. The taking and recording of evidence, observed *West* J. in *Hariram Birbhan*,[2] are essential, and when this is not done, there is a failure of jurisdiction, the defect in which cannot be cured by silence or neglect or waiver, positive

1. (1904) J. P. 54.
2. (1874) 11 Bom. H. C. R. 170.

or negative, of the party interested. A Police report does not give jurisdiction to a Magistrate to call on a person who has given a recognizance bond, to pay the penalty without previous *prima facie* proof that it has been forfeited. On the question of waiver I shall refer my readers to the cases of *Park Gate Iron Company* v. *Coates*,[1] and of *Morgan* v. *Edwards*.[2] In the former occur the observations of *Brett* J. that in a matter of jurisdiction there is no difference between civil and criminal matters ; but where the question of jurisdiction does not arise, provisions made for the benefit of a particular party may be waived by him. The cases collected in *Broom* at p. 531, (7th Ed.) are mostly criminal cases.

*Penal Clause Strictly Construed.*—A forfeiture can only take place upon a breach of the condition of the bond ; and a penal clause will always be strictly construed. So, where a surety executed a bail-bond guaranteeing that the person for whom he stood surety, would appear at the Court of a Deputy Magistrate before whom the case was pending, and the accused failed to appear before the District Magistrate to whose file the case had been transferred, it was held that there was no breach of the conditions of the bail-bond and the order forfeiting the bond was set aside. The responsibility of the surety ceased as soon as the case was transferred from the Court in which he was bound to present the accused—*Shamsuddeen.*[3] Similarly where the bond was for appearance on what turned out to be a Sunday, and the Magistrate took up the case the next day and estreated the bond, the High Court set aside the order of forfeiture as "in strictness they were only bound to appear upon the day upon which they were ordered to do so."—*Asanulla.*[4]

*Realisation.*—If a bond has been forfeited, both the surety and the principal may be proceeded against, and the penalty, if not paid, may be recovered from them, or if they, or either of them, be dead, from the estate of either. If the surety dies before forfeiture, his estate will not be liable—sub-sec. (6). To fasten liability on his estate, forfeiture must be proved to have taken place before death. The rule of the liability of the legal representative will lose much of its rigour when it is remembered that the law

1. (1870) L. R. 5 C. P. 634.
2. (1859) 5 H. & N. 415.
3. (1902) 30 Cal. 107
4. (1898) 2 C. W.N. 519.

enables the surety to apply at any time to be discharged—S. 502, Cr. P. C.

There is nothing in the section which prevents an accused person who has forfeited his bail-bond by default of appearance from being proceeded against under S. 174, I. P. C., notwithstanding that his surety has paid the penalty mentioned in the recognizance—*Tajvomuddy.*[1] Neither the law nor the form in the schedule, however, makes it clear as to whether the principal and the surety are liable in the same or in several sums. The course, again, is seldom resorted to in practice.

When a forfeiture of a recognizance bond has been proved before a Magistrate, he ought to consider what punishment is suitable for the offence entailing the forfeiture, in addition to the penalty due under the bond. He ought not to punish for the offence, and then, at some other time, take steps to recover the penalty—*Parbutty.*[2] " It cannot be the intention of the legislature that when the forfeiture of a bond has been proved before a Magistrate, the recovery of the penalty is to be kept suspended over the head of the person liable, for an indefinite period." " As matters stand, we have a punishment measured out which must be taken to be the full punishment which the convicting Court considered appropriate at the time, and then we have superadded, on a review of the circumstances at another time, an additional penalty, the effect of which must be to make the original penalty, when viewed as only a part of the punishment inflicted, an excessive one." Cf. also *Ramchunder.*[3] This view was dissented from in *Rajaram*[4]. "A Magistrate who passes an appealable sentence on a conviction for a breach of the peace may very well wait until the period of the appeal has expired, or if an appeal is filed, till it is decided, before he proceeds to take action under S. 514."

*Remission or Reduction of Amount.*—In the case of ***Nilmadhub Ghoshal***[5] the High Court of Calcutta held that the High Court had no power to reduce the amount of recognizances which had been forfeited. The Bombay High Court expressed the same opinion. The Magistrate or Sessions Judge concerned may, if he thinks the

1. (1868) 10 W.R Cr. 4.
2. (1878) 3 C. L. R. 406.
3. (1877) 1 C. L. R. 134.
4. (1903) I. L. R. 26 A. 202.
5. (1872) 19 W. R. Cr. 1.

amount excessive, refer the matter to the Local Government who alone have the power to deal with the matter—*Noor-ool-Huq*[1]; *Naki Hazi*[2]. In any case the Magistrate or Judge may decide not to proceed under S. 514 at all.

*Appeal.*—Under S. 515, all orders respecting bonds, of whatever description they may be, passed under S. 514, are appealable to the District Magistrate. The District Magistrate has also *revisional* powers in the matter. The case of *Anantha Charri*, [3] is no longer good law. The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session (S.516). The machinery for levying amounts forfeited in bonds has been provided in S. 514, and is similar to that for levying fines. (Section 386, Cr. P. C.)

*Bibliography.*—To the reader ambitious of a fuller research, I should recommend the following works :—

*Archbold's* Criminal Pleadings.
*Harris's* Criminal Law.
*Wharton's* Law Lexicon.
*Encyclopædia* of the Laws of England.
*Stephen's* Digest of Criminal Procedure.
*Mew's* Digest; *Woodman's* Digest.
*Bishop's* Criminal Procedure (American.)
*Prinsep's*, *Henderson's*, *Sohoni's* and *Mitra's* Editions of the Code of Criminial Procedure.
*Burns'* Justice of the Peace.
*Wigram's* Justice's Note Book.
*Stone's* Justice's Manual.
*Lord Brampton's* Reminiscenses.

SARATCHANDRA LAHIRI,
*Vakil, High Court, Calcutta.*

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## NOTES OF INDIAN CASES.

**Ponnusamy Mudaliar v. Srinivasa Naickan.**—I. L. R. 31 M. 333.—The learned Judges affirm the statement of the law

1. (1878) I. L. R. 3 Cal. 757. 2. (1881) 8 C. L. R. 72.
3. (1881) 2 M. 669.

extracted in the judgment of the Lower Court from Page 380 of Dr. *Ghose's* work, viz.:—'If a mortgagee with notice that the equity of redemption in a part of the mortgaged property has been conveyed, releases any part of the mortgaged estate, he must abate a proportionate part of the mortgage debt as against such purchaser.' We are unable to agree with our contemporary, the *Allahabad Law Journal* (5 A. L. J., p. 320), that this statement of Dr. *Ghose* has been misapprehended by the learned judges. But with all deference to the learned author, we venture to doubt the correctness of the rule (as stated by him) under the law in India. Dr. *Ghose* admits that the English law affords no guidance in the matter as *Kettlewell* v. *Watson*[1] lays down the rather extreme rule that 'if a person, who has a security upon two or more properties which he knows to belong to different persons, releases his lien to one of such persons, he cannot afterwards insist upon it as against the others.' It is noteworthy that in respect of *personal* obligations the Indian Contract Act disowns the rule of English law—see *In re E. W. A.*[2]—and provides that when two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor, nor free the released person from responsibility to the other joint promisor (S. 44). It may, we think, be reasonably contended that the same rule should be applied in this country in respect of the liabality of several mortgaged properties to satisfy the mortgage debt.

Dr. *Ghose* takes his rule from the American Law (Jones On *Mortgages*, S. 723) but as appears from the next preceding section in Mr. Jones' book, the American cases proceed upon the assumption that in the case of a release of a part of the mortgaged property, the person interested in the other part cannot compel the owner or purchaser of the released parcel to *contribute* to the mortgage debt, for contribution there is by subrogation to the morgagee's title. 'The mortgagee who has interfered and discharged a portion of his lien must in effect make contribution' by abating a proportion of the mortgage debt (Jones, S. 722). But in India, contribution rests not on mere equity but on the express statutory charge declared by S. 82 of the Transfer of Property Act (cf. *Webb* v. *Macpherson*, [3] for an instance of the distinction between

1. (1882) I. L. R. 21 Ch. D, 685, 714. 2. L. R. (1901) 2 K. B. 642.
3. (1903) I. L. R. 31 C. 57 (P. C.)

an 'equity' and a 'statutory charge)' and on the analogy of S. 44 of the Contract Act, it may be contended that no transaction between the mortgagee and one of the mortgagors or the owner of one of the mortgaged properties will affect the liabilities *inter se* of the mortgaged properties. If, as held in *Jagat Narain* v. *Pertab Husain* [1] (followe[d] in *Chagandas* v. *Gansing* [2] and *Krishna Aiyar.* v. *Muthukumaraswamy Pillai*[3]) the fact that by the frame of his suit the mortgagee had put it out of his power to proceed by another suit against some of the mortgaged properties, would not prevent the owner of other properties comprised in the mortgage, who had paid up the mortgage debt, from claiming contribution from the owner of the first mentioned properties, it is difficult to see why the same argument should not hold good in the present case. And if this contention be well founded—some of the observations in *Sheo Tahal Ojha* v. *Sheodan Rai*[4] would seem to support it—it would follow that so long as the equities in the matter of contribution are unaffected by the act of the mortgagee his right to be paid the whole of his debt from whatever portion of the mortgaged properties he wishes to comprise in his suit cannot be questioned—*Krishna Aiyar* v. *Muthukumarasawmia Pillai* [5].

The opinion of the Calcutta High Court in *Surjiram Marwari* v. *Barhamdeo Persad* [6] is based on an assumption which is inconsistent with the view taken in the Allahabad and Madras cases above referred to. *Harrington* J. assumes that apart from any question of release or equities in favour of subsequent purchasers, mortgagors could always contend that the mortgagee must seek his remedy 'against the whole of the mortgaged property, because they had not agreed that the debt should be allocated to anything except the property comprised in the mortgage.' This assumption of the learned Judge seems to us erroneous. As observed by *Banerji* J. in *Sheo Tahal Ojha* v. *Sheodan Rai*[4] where several properties are mortgaged to the same mortgagee for the same debt, each of these properties is liable, as between the mortgagor and the mortgagee, for the whole of the debt; and the mortgagee has the right to recover the debt

1. (1880) I. L. R. 2 A. 807.
2. (1895) I. L. R. 20 B. 615.
3. (1905) I. L. R. 29 M. 217.
4. (1905) I. L. R. 28 A. 174.
5. (1905) I. L. R. 29 M. at 225.
6. (1905) 1. C. L. J. 337.

from any part of the property. There is no obligation on him to proceed against the whole of the property.' *Mookerjee* J. lays stress on the *justice* of the rule and gives no reasons in support of it. (See also *Surjiram* v. *Barhamdeo*[1] and *Imam Ali* v. *Baijnath Ram Sahu*[2]. In *Ramkinkar Biswas* v. *Akhil Chandra Chaudhuri*[3], the Full Bench deemed it unnecessary to decide the present question).

The theory suggested in *Harikissen Bhagat* v. *Veliat Hossein*[4], that a release of part of the security must be treated as amounting to a 'splitting up' of the mortgage so as to entitle the owner of the other mortgaged properties to redeem them on payment of a proportionate share of the mortgage debt seems to us difficult to support on principle and does not appear to have been suggested even in the American cases.

**Surampalli Bangaramma** *v.* **Surampalli Brambaze.**—I. L. R. 31 M. 338.—In this case the learned Judges hold that a woman who, even during her husband's lifetime, has lived apart from him but for no corrupt purposes, and after his death, lives apart from her father-in-law, is nevertheless entitled to maintenance from ancestral property in the hands of the father-in-law.

This precise question has not, so far as we are aware, been heretofore decided ; but there can be no doubt that the decision is in accord with the sentiment of the Hindu community.

The reasoning of the judgment seems, however, in some places open to question. *Wallis* J. bases his opinion on the ground that the wife's breach of duty in living away from her husband only *suspends* her right to maintenance, and that as such living apart ceases to be a breach of duty, when the husband is dead, there is nothing to prevent her from enforcing a widow's claim to maintenance. This argument does not give sufficient prominence to the circumstance that a wife's right to maintenance against her husband *personally* rests on a different footing from that of a widow against *ancestral property* in the hands of her father-in-law. *Sankaran Nair* J. recognises the distinction and holds that the widow's claim to maintenance from the father-in-law, in possession of joint family property 'cannot be defeated by her

1. (1905) 2 C. L. J. 202.
2. (1906) I. L. R. 33 C. 613.
3. (1907) I. L. R. 35 C. 519.
4. (1903) I. L. R. 30 C. 755.

conduct towards her husband', though such conduct might have disentitled her to claim maintenance from her husband. If, however, this observation of the learned judge is to be understood as suggesting that so far as the widow's *legal* claim to maintenance from the father-in-law is concerned, her conduct during her husband's lifetime is altogether immaterial, it seems to us to go too far.

All claims to maintenance under the Hindu Law rest on status and not on contract—*Sidlingappa* v. *Sidava*[1]. But even as such, they fall under two main heads.

Apart from the possession of property, a *personal* obligation to maintain certain relations is declared by the express mandatory texts of Hindu Law and among these is the obligation of the husband to maintain the wife, which, however, is conditional upon her being virtuous or dutiful.

But the joint family property being the source of maintenance for all the members of the family, male or female, *membership* in the family is the basis of a right—almost unconditional —to be maintained, not by any particular person, but out of the *family property*. A woman, by her marriage, passes into her husband's family and (in the language of JIMUTAVAHANA) acquires an interest in its property which entitles her to be maintained out of it. This right subsists as long as she continues to be a member of that family. Neither the husband's death nor, ordinarily, even her relations wlth him during his lifetime, would affect it. But her conduct towards her husband or during his lifetime may be such as to degrade her and in the eye of the Hindu Law terminate her membership in the family ; this would disentitle her to claim maintenance after her husband's death, even from the family property in the hands of the father-in-law.

Justice *Sankaran Nair* bases his decision on the ground of the son's moral obligation ripening into a legal obligation on the father. This theory, enunciated in *Janki* v. *Nandram*[2], and followed in several later cases, is one of the anomalies of Anglo-Hindu law, similar to the theory of the legal enforceability of the pious obligation of the son to pay his father's debts. The decision in *Janki* v. *Nandram*[2], might well have been based on the

1. (1878) I. L. R. 2 B. 624 (F. B.) 2. (1888) I. L. R. 11 A. 194.

ground that the self-acquired property of the father was in the hands of the son's *family* property out of which the predeceased son's widow, as a member of the family, would be entitled to maintenance. The daughter's claim to her marriage expenses, relied on as an analogy in that case, could be similarly explained. But, whatever may be the force of this metamorphosis argument in connection with *inheritance*, it is impossible to apply it to cases of succession by *survivorship*, for the survivor is not bound to discharge even the *legal* personal obligations of the deceased co-parcener. The further statement of the learned Judge that there is a moral obligation on the father-in-law, to maintain the daughter-in-law, which the possession of ancestral estate converts into a legal obligation, we are unable to follow.

**Pramada Nath Ray *v.* Poorna Chandra Ray.**—I. L. R. 35 C. 691.—A Shebait had been, as was found, wrongly in possession of land and a decree was obtained against him for mesne profits. Having regard to the frame of the suit and the fact that the Shebait held possession in assertion of the right of the endowment, the Court held that the decree was against him, not personally, but as Shebait. The learned Judges were, therefore, of opinion that the property of the idol was liable to make good the claim for mesne profits.

If the judgment had proceeded on the technical ground that the decree, rightly or wrongly, being against the trust estate, it was not open to the *executing* Court to go behind it, the question may bear a different aspect. As was observed by *Sale* J. in *In re Shard*,[1] the mere fact that the defendant is sued as trustee will not enable the plaintiff to obtain a decree executable against the trust property. But *Doss* J. bases his opinion on the ground that as a matter of substantive law, the property of the idol is, under the circumstances, liable to make good the claim for mesne profits, ***even if the rents and profits realised during the period of wrongful possession had been appropriated by the Shebait for his own private purposes and not to those of the idol.*** From this opinion we must respectfully dissent.

The learned judge relies mainly on the analogy of the liability of a corporation for wrongs committed by its agents in the course of their employment and for the apparent furtherance of its

1. (1901) I. L. R. 28 C. 574.

purposes. It is submitted that there is really no analogy between the two cases. There is an important distinction in principle between cases in which one person—natural or artificial—is *liable to be sued* for the acts of another and those in which a person is, under certain circumstances, *liable to make good out of certain property* the loss caused to a third person by acts done on behalf of, or in the course of, the management of such property.

The liability in the first class of cases rests on agency, or *representation of the person*; in the second, it rests on the principle of *indemnity from the estate*. In the first, the injured person can hold the *principal* liable to the *full* extent to which the agent doing the wrong could be held liable, for the two persons are in law the same; in the second, he can get redress from the *estate* only to the extent to which the wrong-doer would be entitled to indemnity from the estate, for he can reach the estate at all only by the principle of subrogation. The liability of a corporation for the tortious acts of its *agents* falls under the first of the above heads, and the liability of the trust estate for the consequences of the tortious acts of the *trustee* falls under the second. The learned Judge has lost sight of this distinction and has fallen into a mistake in treating the liability of the trust estate declared in *Raybould* v. *Turner*[1], as being but an 'illustration,' 'though perhaps not so obvious' of the 'general principle' of the liability of principals (or masters) for the acts of their agents (or servants). The trust estate has to be reached by the principle of subrogation, not, as the learned Judge assumes, because of the peculiar rule of English law which vests the legal estate in the trustee, but because, the trustee not being an *agent* within the meaning of the general rule of the principal's liability, the estate could not otherwise be reached by a person injured by the tortious act of the trustee.

The inaccurate though familiar use of the word 'agent' has, we think, led the learned Judge into this error (*cf.* Lord *Westbury's* observations on the loose use of the word 'trustee', in *Knox* v. *Gye.*[2]) Agency rests on relation by *agreement*; the agent represents the *person* of his principal. But there are several situations in which one person in substance acts for another, which, however, cannot properly be called agency, *e. g.*, the cases of

1. (1900) L. R. 1. Ch. 199. 2. (1872) L. R. 5 H. L. at p 675.

trustees, guardians, &c. They act not as agents but as principals; they represent no person, but an estate. The very decision of the Judicial Committee referred to by the learned Judge, *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*[1], shows this; for nobody would suggest that the minority of an agent would give the principal, under S. 7 of the Limitation Act, an extension of time for filing a suit. The Judicial Committee said, of the manager of a joint Hindu family: 'Such a person is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation * * * is more like that of trustee and *cestui que trust*.'—*Annamalai Chetti* v. *Murugesa Chetti*.[2] It may be said that the idol is not the *cestui que trust*, but the legal owner. True; but the legal relation between the idol and the Shebait is not that of principal and agent, but rather that of ward and guardian. The idol cannot (like a principal) *revoke* the appointment of the trustee or (like a master) *control* his acts.

If the true rule applicable is that of subrogation, it follows that "where the trustee is himself in default in payment of money or by not bringing profits into account, his right to indemnity is gone to the extent of his indebtedness" and third parties cannot reach the estate through him (*Godefroi on Trusts*, 3rd Edition p. 366.) See also *In re Shard.*[3]

**Akshay Chandra Bhattacharya** *v.* **Haridas Goswami**—I. L. R. 35 C. 721.—In this case, Mr. Justice *Mitra* (sitting as a single Judge) has held that even under the Dayabhaga law an *undivided* nephew would inherit the uncle's estate in preference to a divided nephew (cf. *Fakirappa* v. *Sellappa*[4]). The learned Judge almost conclusively proves the fallacy of the current notion that capacity for conferring spiritual benefit is the *sole* test of inheritance under the Bengal School. The subject is elaborately discussed by Mr. Sarkar Sastri in Chapter IX of his book on Hindu Law. But in a very recent case (*Krishna Pada Dutt* v. *Secretary of State for India*[5]) two other learned judges of the Calcutta High Court (*Maclean* C. J. and *Doss* J.) were of opinion that a sister's daughter's son was *no heir* at all under the Dayabhaga and they

1. (1904) I. L. R. 32 C. 129.
2. (1903) I. L. R. 26 M. at 553.
3. (1901) I. L. R. 28 C. 574.
4. (1896) I. L. R. 22 B. 101.
5. (1908) I. L. R. 35 C. 681.

said: "If competency to offer funeral oblations is, as indeed it has been declared by the author of the Dayabhaga to be, the principal ground for the succession of the sister's son, we fail to see how the son of the daughter of the sister can claim inclusion in the category of heirs upon any other ground." The learned Judges seem practically to accept the contention of the Government Pleader that *in matters of inheritance* the Mitakshara has no application in the Bengal School even in cases where the Dayabhaga lays down no express provision to the contrary. The fundamental error began with the assumption by some of the early authorities that under the Dayabhaga, spiritual benefit was the basis of the right to succeed and not merely a ground of preference. The theory of propinquity and the theory of spiritual benefit are not so mutually exclusive as is sometimes imagined. Each is the complement of the other, and the two schools differ only in the *predominance* they give to the one or the other of the two theories.

**India Publishers Limited** *v.* **Aldridge.**—I. L. R. 35 C. 728.—It is to be regretted that a beneficent provision like S. 14 of the Limitation Act should be so badly worded as to give rise to numerous conflicting rulings. We must own our inability to conceive of any cause which all will agree in holding to be one 'of a like nature' with defect of jurisdiction, for the purposes of the section. In the present case, the three learned Judges have held that an improper joinder of parties or of causes of action is not a 'cause of like nature' within the meaning of the section. We are unable to agree with Sir *Francis Maclean* C. J. that the law in India as to joinder is less uncertain or complicated than that relating to the jurisdiction of Courts. In the new Limitation Act, no attempt has been made to mend the language of the section, but the Legislature has to some extent cut the knot by adding an Explanation declaring that, for the purposes of the section, misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

## SUMMARY OF ENGLISH CASES.

### Great Western Railway Co. *v.* Midland Railway Co.

[1908] 2 Ch. 644.

*Construction of Statute—Powers exercisable for a limited period —Expiration of time allowed—Power to complete, notwithstanding.*

In this case, the Court of Appeal confirmed the judgment of *Warrington* J. reported at (1908) 2 Ch. p. 455 on the construction of a Statute which authorised a Company to construct a Railway line within five years, on the expiration of which period the powers conferred by the Act were to cease. Their Lordships agreeing with *Warrington* J. held that if the Company had, before the expiration of the period, lawfully acquired the right to use the land, it could construct the line, under its common law powers, notwithstanding that the five years had expired.

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**Burgess** *v.* **Booth.** [1908] 2 Ch. 648 (C.A.).

*Order directing sale of realty—Infant—Conversion.*

An order of Court directing sale of real property belonging to an infant operates as a conversion and the proceeds devolve upon the personal heirs of the infant.

[Judgment of *Eve* J. in (1908) 1 Ch. 880 reversed.]

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**Elliston** *v.* **Reacher.** [1908] 2 Ch. 665 (C.A.).

*Restrictive covenants—Purchasers from a common vendor—Building scheme.*

In this case, the Court of Appeal approved of *Parker* J's. statement as to the requisites for enforcing restrictive covenants as between different purchasers from a common vendor.

[Judgment of *Parker* J. in (1908) 2 Ch. 374 affirmed (18 M. L. J. 356).]

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### *In re* Lord Grimthorpe.—Beckett *v.* Grimthorpe.

[1908] 2 Ch. 675.

*Trust for sale of realty—Trust failing—No conversion—Reconversion when?*

By a marriage settlement property was settled for the use of the settlor for life, remainder upon trust to sell and hold the proceeds for the benefit of the settlor's children, with an ultimat

trust in favour of the settlor absolutely. The settlor died, leaving no issue, directing by his will that the property should go to his successor in fee. The question was whether the property devolved on the successor as realty or personalty.

*Held*: (1) The trust for sale on the death of the settlor failing, no question of conversion or reconversion really arose ; (ii) in any view the estate devolved as realty under the will of the settlor, it being in his power to reconvert.

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*In re* **Bruce—Lawford** *v.* **Bruce.** [1908] 2 Ch. 682 (C.A.).

*Residuary legatee—Duty to account for statute-barred debt.*

Reversing the judgment of *Neville* J. in [1908] 1 Ch. 850, it was held in this case that the residuary legatee was not bound to account for the statute-barred debt due from another person (whose executor and sole residuary legatee he was) to the estate. In the absence of any legal liability (though statute-barred) on the residuary legatee himself, there was no foundation for such a claim against him.

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*In re* **Harrington : Wilder** *v.* **Turner.** [1908] 2 Ch. 687.

*Bastardy Laws Amendment Act,* (35 *and* 36 *Vic., Cap.* 65) *S.* 4—*Maintenance—Claim against the estate of deceased father unsustainable.*

Under S. 4 of the Bastardy Laws Amendment Act an order was made against the putative father of a child for the payment of a weekly sum to the mother for the maintenance of the child. On a claim against the estate of the deceased father for arrears of maintenance which accrued due during his life-time as well as subsequent arrears :

*Held*—that it was unsustainable. Where "a statutory obligation is imposed and a statutory mode for enforcing it is provided by the same statute, the intention of the legislature is that it shall be the only mode of enforcing it and that it shall not be enforced by ordinary process of law." Under S. 4, the justices order that the putative father shall pay a weekly sum, and in the same section there are elaborate provisions for enforcing payment. The obligation under the section, was, in terms, only an obligation on the father himself. It was, therefore, not a debt recoverable from the representatives of the deceased.

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### *In re* Walker: Walker *v.* Walker. [1908] 2 Ch. 705.

*Personalty to devolve as realty—Conditions necessary—Imperative trust for conversion—Declaration that it shall pass as realty inoperative.*

Although the legislature can, by a simple enactment to that effect, make personalty devolve and pass to a series of persons successively for the same interests as if it had been realty, the only manner in which a private individual can do this is by creation of an imperative trust for its conversion into realty. A mere declaration that personalty shall devolve as realty (though it may be of help to the Court in construing the document) is inoperative for such a purpose. A declaration that it should devolve as proceeds of a free-hold estate under the Settled Land Act, stands on no higher footing.

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### Rex *v.* Lecouturier. [1908] 2 Ch. 715 (C. A.)

*Trade mark—Chartreuse, name of the liqueur, not geographical—Not transferred by transfer of business in France—"Passing off" action.*

The word "Chartreuse," though originally the name of a place in the market, had come to mean a liqueur manufactured by a body of monks in France by a secret process known only to them, and in respect of which they had registered a trade mark in England. By a French Statute, as interpreted by a French decision, the business of the monks in France vested in a liquidator who transferred it to the present defendants. *Held*: the defendants (respondents) did not by reason of the transfer of the business in France, become entitled to the trade marks in England. Apart from any right to the trade marks the plaintiffs (the monks) were entitled to restrain the defendants from passing off their goods as "Chartreuse" or liqueur manufactured by the plaintiffs.

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### Joel *v.* Law Union and Crown Insurance Coy. [1908] 2 K. B. 863 (C. A.)

*Insurance—Innocent non-disclosure of material facts—Avoidance of Policy—Onus.*

In contracts of insurance "there is an obligation to disclose what you know and the *concealment* of a material circumstance

known to you, whether you thought it material or not, avoids the policy."

"The onus of proving non-disclosure or concealment is on the insurance office."

"If a person effecting a policy of insurance says 'I warrant such and such things which are here stated' and that is part of the contract, then whether they are material or not is quite unimportant—the party must adhere to his warranty, whether material or immaterial. But if the party makes no warranty at all, but simply makes a certain statement, if that statement has been made *bona fide*, unless it is material, it does not signify whether it is false or not false. Indeed, whether made *bona fide* or not, if it is not material, the truth is quite unimportant. * * * If there is no fraud in a representation of that sort, it is perfectly clear that it cannot affect the contract; and even if material, but there is no fraud in it, and it forms no part of the contract, it cannot vititate the right of the party to recover." *Anderson* v. *Fitzgerald*[1] and *Browlie* v. *Campbell*[2] followed.

Where the assured has given the insurer all the material information or all the means to acquire the same, the policy cannot be avoided.

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**North Western Rubber Coy., Ltd. *v.* Huttenbach & Co.** [1908] 2 K. B. 707 (C. A.).

*Contract—Arbitration—Custom contrary—Arbitrators exceeding their jurisdiction—Nullity of award*

In a case of a contract to sell by description, one of the terms of the contract being "any dispute on this contract to be settled by arbitration," the arbitrators have no jurisdiction to compel the buyers to accept goods of an inferior quality at a reduced price even if there is a local custom to that effect, the custom being contrary to the terms of the contract. Even if such a custom could be proved, an award based on the supposed existence of the custom, which did not in fact exist, is not binding if the parties during the course of litigation make existence or non-existence of the custom a material issue in the case.

"In a sale by description involving as a condition that the goods should be 'of fair usual quality,' the arbitrators have no

1. (1853) 4 H. L. C. 484.    2. (1880) 5 A. C. 925.

right to convert what was only a condition into a warranty." *Hutcheson* v. *Eaton*[1] followed.

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**McDonald v. Owners of S. S. "Banana."**

[1908] 2 K. B. 826 (C. A.).

*Workmen's Compensation Act—Onus—No compensation in the absence of clear proof that injury arose out of, and in the course of employment.*

A servant of a ship went on shore and on his return while he was very near the ship he sustained an injury and died. On a claim by his widow for compensation, there being no proof that the deceased went on shore on ship's business :—

*Held* that the plaintiff was not entitled to recover. "'The burden, and the whole burden, of proving the conditions essential to the obtaining an award of compensation rests upon the applicant and upon nobody else, and if he leaves the case in doubt as to whether those conditions are fulfilled or not, where the known facts are equally consistent with their having been fulfilled or not fulfilled, he has not discharged the onus which lies upon him. In my opinion the evidence is quite consistent with the view that the accident happened in consequence of something which did not arise out of the employment. There seems to be no presumption in favour of one view rather than of another, and that is precisely the position that was dealt with by the House of Lords in *Wakelin* v. *London* and *S. W. Ry. Co.*[2] The House of Lords there declined to act upon the presumption *Omnia præsumuntur rite esse acta* that the deceased man behaved with care.'—Per Lord Collins in *Pomfret* v. *Lancashire and Yorkshire Railway Company.*[3]"

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**Wrigby v. Lowndes.** [1908] P. 348.

*Power of appointment—Exercise of, in general terms of a will—Intention.*

A testatrix who had separate property and who could also exercise a power of appointment in favour of *A*, exercised the

1. (1884) 13 Q B, D, 1886. 2. (1886) 12 A. C, 41,
3. (1908) 2 K. B. 718,

power by a will referring in specific terms to the power, and afterwards executed another will whose only contents were. "I wish to leave at my death everything I have power to will, to *A*."

*Held*: (1) that by the last will the previous will was revoked, and that as the testatrix knew of her power of appointment at the time of the second will the power was exercised though the second will was in general terms so as to be capable of disposing even her separate property and (2) that the question whether a specific power was exercised in any given case is one that ought to be gathered from all the attendant circumstances.

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*In re* **F. D. Meyer.** [1908] 2 P. 353.

*Wills of two persons—Similarity of—Signature by each, under mistake, in the will of another—Effect—No Probate.*

Two sisters wishing to execute wills exactly similar to one another, each disposing of her property in favour of the other, mistakenly signed the will intended for the other. On the death of one:—

*Held*: that as the deceased did not intend to execute the will which she actually signed, no probate could be given for it, although it was similar in terms to the one intended and although the other consented to the grant of probate.

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## JOTTINGS AND CUTTINGS.

### American Bar Association Canons of Ethics.

I

PREAMBLE.

In America, where the stability of Courts and of all departments of Government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

II

## THE CANONS OF ETHICS.

No code or set of rules can be framed, which will particularize all the duties of the lawyers in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide; yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

1. *The Duty of the Lawyers to the Courts.*—It is the duty of the lawyers to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamour. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyers to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

2. *The Selection of Judges.*—It is the duty of the Bar to endeavour to prevent political considerations from outweighing judicial fitness in the selection of judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

3. *Attempts to exert Personal Influence on the Court.*—Marked attention and unusual hospitality on the part of lawyers to a judge, uncared for by the personal relations of the parties, subject both the judge and the lawyer to misconstructions of motive, and should be avoided. A lawyer should not communicate or

argue privately with the judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due to the judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

4. *When Counsel for an Indigent Prisoner.*—A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5. *The Defence or Prosecution of those accused of Crime.*—It is the right of the lawyer to undertake the defence of a person accused of crime, regardless of his personal opinion as to the guilt of the accused ; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defence. Having undertaken such defence, the lawyer is bound by all fair and honourable means to present every defence that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

6. *Adverse Influences and Conflicting Interests.*—It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the

subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

7 *Professional Colleagues and Conflicts of Opinion.*—A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague, if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interests of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. On this event, it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any ways to encroch upon the business of another lawyer, are unworthy of those who should be brethren at the Bar ; but, nevertheless, it is the right of any lawyer, without fear or favor to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyers of whom the complaint is made.

8. *Advising upon the Merits of a Client's cause.*—A lawyer should endeavour to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses and through mistakes of juries and errors of courts even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

9. *Negotiations with Opposite Party.*—A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

10. *Acquiring Interest in Litigation.*—The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting.

11. *Dealing with Trust Property.*—Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and, except with the client's knowledge and consent, should not be commingled with his private property or be used by him.

12. *Fixing the Amount of the Fee.*—In fixing fees, lawyers should avoid charges which over-estimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his property may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labour required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the

compensation ; and (6) the character of the employment, whether casual or for an established and constant client.

No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of Justice, and not a mere money-getting trade.

13. *Contingent Fees.*—Contingent fees, where sanctioned by law, should be under the supervision of the Court in order that clients may be protected from unjust charges.

14. *Suing a Client for a Fee.*—Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and law suits with clients should be resorted to only to prevent injustice, imposition or fraud.

15. *How far a Lawyer may go in supporting a Client's cause*: —Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties, than does the false claim, often set up by the unscrupulous in defence of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes " entire devotion to the interest of the client, warm zeal in the maintenance and defence of his right, and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defence that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defence. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not

without the bounds of the law. The office of attorney does not permit, much less does it demand of him, for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

16. *Restraining Clients from Improprieties.*—A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.

17. *Ill-feeling and Personalities between Advocates.*—Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanour toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncracies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. *Treatment of Witnesses and Litigants*—A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19. *Appearance of Lawyer as Witness for his Client.*—When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.

20. *Newspaper Discussion of Pending Litigation.*—Newspaper publications by a lawyer as to pending or anticipated

litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice.

Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *exparte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *exparte* statement.

21. *Punctuality and Expedition.*—It is the duty of the lawyer not only to his client, but also to the Courts and to the public, to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

22. *Candour and Fairness.*—The conduct of the lawyer before the Court and with other lawyers should be characterized by candour and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonourable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence, which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or by-standers.

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These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. *Attitude towards Jury.*—All attempts to curry favour with juries by favouring, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and, both before and during the trial, he should avoid communicating with them, even as to matters foreign to the cause.

24. *Right of a Lawyer to control the Incidents of the Trial.*—As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

25. *Taking technical advantage of opposite Counsel; Agreements with him.*—A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonourable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

26. *Professional Advocacy other than before Courts.*—A lawyer openly, and in his true character, may render professional services before legislative brother bodies, regarding proposed legislation and in advocacy of claims before departments of Government, upon the same principles of ethics which justify

his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.

27. *Advertising, Direct or Indirect.*—The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom and sometimes of convenience, is not *per se* improper.

But solicitation of business by circulars or advertisements or by personal communications or interviews, not warranted by personal relations, is unprofessional.

It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyers.

Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concering the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

28. *Stirring up Litigation, directly or through Agents.*—It is unprofessional for a lawyer to volunteer advice to bring a law suit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law.

It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those

who bring or influence the bringing of such cases to his office or to remunerate police-men, Court or prison officials, physicians, hospital *attachés* or others who may proceed under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner immediately to inform thereof to the end that the offender may be disbarred.

29. *Upholding the Honor of the Profession* :—Lawyers should expose without fear or favor, before the proper tribunals, corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The author should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honour and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

30. *Justifiable and Unjustifiable Litigations.*—The lawyer must decline to conduct a civil cause as to make a defence when convinced that it is intended merely to harrass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty, to insist upon the judgment of the Court as to the legal rights of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

31. *Responsibility for Litigation.*—No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising questionable transactions,

for bringing questionable suits, for urging questionable defences, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32. *The Lawyer's duty in its Last Analysis.*—No client, corporate, or individual, however powerful, nor any cause civil or political, however important, is entitled to receive, nor should any lawyer render any service or advice involving disloyalty to the land whose ministers we are, or disrespect of the Judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honour of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But, above all, a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.—*The Green Bag.*

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*The Modern Patriot*:—Listen, my children, and you shall hear
Of the wonderful jury gathered here.
On the very first vote it was seven to five.
Hardly a man is now alive
Who has anything left of the *drum* of his ear.
'Twas a fine, fine day when the jury went out,
And apparently all knew what they were about.
With Billy and Denny as their body-guard,
They were sent to the room where the chairs were hard,
And there they wrangled and vainly tried,
To get all the jurors upon one side.
They argued and coaxed and put votes in a hat,
Though some of the jurors in silence sat.

And so the hours went slipping by,
Until every body was ready to die,
And when seven o'clock was drawing near
They went to a house named Paul Revere,
And in gloomy silence they ate full well,
And were then marched back to a dungeon cell.
Once more they talked and talked and talked,
Yet still the five of the jurors balked.
They stolidly sat more dead than alive,
Yet once an hour came " seven to five."
Some cursed their fate, so silent sat ;
One man woke only when passing the hat.
The jurors were firm, too firm, God knows;
And the outcome was, they slept in their clothes.
When morning dawned they were at it still,
So the officers marched them down the hill.
Back again they came, through snowdrifts white,
For six feet of snow had come in the night.
And now they are here, and it's plain to see
This stubborn jury can never agree.
But everyone felt he had earned his pay
And ought to go home to sleep through the day.
To serve one's country is truly great,
But god save us all from this jury's fate :—*Green Bag.*

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*Jurisdiction Lost by Abortive Appeal.*—A strange situation arose respecting the imprisonment of a criminal whose guilt was unquestioned, in a recent Superior-Court case in California, *Ex-parte Hogan* (unreported). Commenting on the peculiar position of the prisoner, the Court said : " This prisoner is like Edward Everett Hale's 'Man without a Country ;' the Sheriff has no process which justifies him in holding him ; no process exists, which would justify the Warden of the State Prison in receiving or holding him; the Court that attempted to sentence him has no power to enter or pronounce any valid judgment, because ousted of jurisdiction by the appeal taken ; and the Appellate Court cannot act, because no judgment was ever entered that can be reviewed." This anomalous condition of

things was caused by a series of errors. In the first place, the Court, after hearing proof against the prisoner charged with burglary, found him guilty without arraigning him for judgment, or informing him of the nature of the charge against him, or asking him to plead, or if he had any legal cause to show why sentence should not be pronounced against him, and purported to sentence him, in violation of the rights of the prisoner under the Penal Code of the State. Entry of the judgment, however, was not made. On the same day, a notice of appeal was served. Afterwards the Court discovered that it had failed to comply with the statutory requirements on the trial, and directed the clerk to suspend the entry of judgment, with the result that no judgment was ever entered. Two years and eight months after, *habeas corpus* was brought for the release of the prisoner, and the Court held that the prisoner could not be lawfully imprisoned under the original commitment for trial, because that had been superseded, and that there was no judgment under which his imprisonment could be justified. It also held that the power of the Court to pronounce a proper judgment had been lost not only by the delay, but by the abortive appeal. As quoted above, it declared that the appeal ousted the lower Court of jurisdiction, while the Appellate Court gained no power to act, because there was no judgment ever entered that could be reviewed. Admitting that the prisoner was guilty, it therefore held there was no sanction for keeping him in prison. The Court said that, while it was to be deplored that he should go unwhipped of justice, he could not be permitted to remain in the county jail *in perpetuam* without any process. But, whatever may be true as to the effect of long delay in the proceedings to entitle the prisoner to a charge, it is certainly a strange result of an ineffectual attempt to appeal, that the jurisdiction of the lower Court is destroyed without any jurisdiction being acquired by the Appellate Court. That jurisdiction can be lost in transit between courts seems to be a novel proposition. If an abortive attempt does not transfer jurisdiction to the upper Court, why should it be held to divest the lower Court of jurisdiction ? The doctrine of the present case, however, is that the appeal was not premature because the Court had pronounced its judgment, and that it stayed the hands of the lower

Court, but conferred no power on the appellate Court. Some decisions were cited in this case to show that the appeal was not premature, and also to show that, as the judgment had never been entered, it did not constitute a valid sentence. But that the doctrine that both courts lose power to act by an attempt to appeal before entry of judgment is one that cannot be easily accepted.—*Case and Comment.*

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## BOOK REVIEW.

*The Indian Evidence Act*: By Cunningham and Shephard. Eleventh Edition. Published by Higginbotham & Co. Price Rs. 12-0-0.—Cunningham and Shephard's Commentaries on the Indian Evidence Act have always been found valuable, and it is an admirable text-book for students. In the present edition many alterations have been made, so that is the book adapted to the present day needs of practitioners and students and fully, maintains the reputation of its predecessors. The bare Act is also separately given, and this will be of great use to the practitioner in finding out particular sections quickly without being lost in the confusion of commentaries.

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## Acknowledgments.

We beg to acknowledge receipt of the following publications :—

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| Allahabad Law Journal for .. .. .. .. | December 1908. |
| Allahabad Weekly Notes .. .. .. .. | Do. |
| Bombay Law Reporter .. .. .. .. | Do. |
| Burma Law Reporter .. .. .. .. | Do. |
| Calcutta Law Journal .. .. .. .. | Do. |
| Calcutta Weekly Notes .. .. .. .. | Do. |
| Canada Law Journal .. .. .. .. | Do. |
| Canada Law Times .. .. .. .. | Do. |
| Central Law Journal .. .. .. .. | Do. |
| Chicago Legal News .. .. .. .. | Do. |
| Criminal Law Journal .. .. .. .. | Do. |
| Harward Law Review ... ... .. ... | Do. |
| Hindustan Review .. .. .. .. | Do. |
| Kathiawar Law Reports .. .. .. .. | Do. |
| Law Magazine and Review ... ... ... ... | Do. |
| Law Students' Helper .. .. .. .. | Do. |
| Law Students' Journal .. .. .. .. | Do. |
| Police Service Magazine ... ... ... ... | Do. |
| Punjab Law Reporter .. .. .. .. | Do. |
| The Law Journal .. .. .. .. | Do. |
| The Lawyer .. .. .. .. | Do. |

The Code of Civil Procedure by Amir Ali and Woodroffe published by Thacker Spink & Co., Price Rs. 24.
Do. by M. C. Sirkar 4th Edition 1909 „ 12.
Do. by Goshal and Mitra „ 8.
Leading Cases (Synopsis of) by B. K Mitra B.A., B.L., published by Thacker Spink & Co. Price Rs 6.

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## NOTES OF RECENT CASES.

*Munro* J.<br>*Sankaran Nair* J. } C. M. A. 176 of 1907.<br>1908 *Jan.* 3.

*Succession Certificate Act, S.* 4.—'*Debt.*'

Where a subscriber to a Chit Fund died after paying two instalments but before winning the prize, and his legal representative who paid the third instalment won the prize :—*Held* that no debt was due to the deceased, and that the legal representative need not produce any succession certificate in order to obtain the prize money.

*C. V. Anantakrishna Aiyar* for appellant.

*T. R. Ramachandra Aiyar* and *T. R. Krishnasami Aiyar* for respondent.

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*Munro* J.<br>*Sankaran Nair* J. } C. M. A. 193 of 1906.<br>1908 *Jan.* 3.

'*Lis Pendens*'—*Conveyance after decree and before appeal.*

A conveyance of suit properties after decree in the first Court and before the filing of an appeal is subject to the rule of *Lis Pendens.*

[*Dinonath* v. *Shama* [1] followed.]

*A. Nilakanta Aiyar* for appellant.

*T. R. Krishnaswami Aiyar* for respondent.

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*Chief Justice.*<br>*Miller* J. } S. A. 299 of 1905.<br>1908 *Jan.* 7.

*Appellate Court, powers of—C. P. C., S.* 568—*Discovery of new document.*

The fact that a new document relevant to the case was discovered only after the filing of the appeal will not give jurisdiction to the appellate Court to admit it under S. 568, C. P. C. The judgment of the lower appellate Court having been based upon

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1. (1900) I.L.R. 28 C. 23.

the strength of the newly admitted document their Lordships reversed the decision and remanded the case for disposal on the other evidence in the case.

[*Kessowji* v. *G.I.P. Ry. Coy.* [1] followed.]

*T. Rangachariar* for appellant.

*T V. Seshagiri Aiyar* and *T. Narasimha Aiyangar* for respondent.

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*Wallis* J.
*Sankaran Nair* J. } Ap. 178 of 1905.
1908 *Jan.* 7.

*Parties — Partition suit between landlords — Tenants not necessary parties—Rates of rent—No necessity to determine.*

In a suit for partition between landlords, the tenants are not necessary parties, though it is desirable to have them ; and the question of rates of rent payable by the tenants on each class of land is foreign to the scope of such a suit.

[*Ramanuja* v. *Virappa* [2] distinguished.]

*Sir V. Bhashyam Aiyangar* and *T. V. Muthukrishna Aiyar* for appellants.

*V. Krishnaswami Aiyar, Sir V. C. Desikachari, V. C. Seshachariar* and *T. Desikachari* for respondents.

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*Chief Justice.*
*Miller* J. } Cr. M. P. 4 of 1908.
1908 *Jan.* 8.

*Cr. P. C., S.* 526—*Transfer—Case and counter-case—Prejudging by Magistrate in one case—Grounds for transfer.*

Where a case and counter-case were filed before a Magistrate who, in giving judgment in one, prejudged the other.:—*Held*, that sufficient ground was shown for the transfer of the latter.

[*Rangasami* v. *The Emperor* [3] followed.]

*T. Richmond* for petitioner.

*The Public Prosecutor* (*E. B. Powell*) for Government.

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1. (1907) I.L.R. 31. B. 381. 2. (1882) I.L.R. 6 M. 90.
3. (1906) I.L.R. 30 M. 288.

*Chief Justice.*
*Miller* J. — S. A. 1021 of 1905.
1908 *Jan.* 10.

*Occupancy for 60 years—Payment of uniform rate of rent—No further proof—No occupancy right.*

Where the only facts proved were that the defendant was in possession of the property as tenant for 60 years at a uniform rate of rent :—*Held*, that this was insufficient to raise a presumption of occupancy right in him, and that the plaintiff was entitled to eject the defendant.

[*Venkatacharlu* v. *Kandappa* [1] distinguished.]

*C. V. Anantakrishna Aiyar* for appellant.

*A. S. Balasubramania Aiyar* for respondent.

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*Boddam* J.
*Munro* J. — C. M. A. 143 of 1907.
1908 *Jan.* 16.

*C. P. C., S.* 503—" *Subject of the suit* "—*Suit for a scheme in connection with a temple—Jurisdiction to appoint a Receiver.*

In a suit for a scheme under Ss. 539 and 30 of the Civil Procedure Code in connection with a temple, the temple and its properties form the subject of the suit within the meaning of S. 503, C. P. C., and it is competent to the Court to appoint a Receiver in respect of them pending the disposal of the suit, even though the plaint contains no prayer for the removal of the trustees.

*V. V. Srinivasa Aiyangar* for appellants.

*K. Srinivasa Aiyangar* and *S. Srinivasa Aiyar* for respondents.

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*Chief Justice.*
*Miller* J. — S. A. 1564 of 1904.
1908 *Jan.* 20.

*Pro-note—Suit on—Jurisdiction—Execution of note outside jurisdiction—Defendant residing outside—Payee residing within jurisdiction—No implied contract to pay there—S.* 17, *Expl.* III., *C. P. C.*

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1. (1891) I.L.R. 15 M. 95.

Where a pro-note is executed at a place and by a person not within the jurisdiction of the Court in which the suit on the note is brought, the mere fact that the plaintiff, the payee, is recited in the pro-note to be residing r having his actual residence within the jurisdiction of the Court is not sufficient to enable him to file the suit in that court, as no contract to pay there could be implied within the meaning of Explanation III to S. 17, C. P. C.

*C. Narasimhachari* for appellant.

*Sir V. C. Desikachari* and *N. R. K. Tathachari* for respondent.

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*Chief Justice*
*Miller* J. } L. P. Ap. 4 of 1908.
1908 *Jan.* 23.

*Appeal—Cl.* 15, *Letters Patent—Order refusing stay of execution—No appeal.*

No appeal lies under Cl. 15 of the Letters Patent against an order of a single judge refusing to stay the execution of a decree pending an appeal.

[*Durga* v. *Mallikarjun* [1] followed.]

*R. Kuppuswami Aiyar* for appellant.
*K. N. Aiya Aiyar* for respondent.

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*Chief Justice*
*Miller* J. } S. A. 208 of 1905.
1908 Jan. 23.

*Hindu Law—Lease by one member of joint family of specific portion—Ouster by another member—Validity of.*

A person who was put in possession as lessee of a specific portion of joint Hindu family property by a junior member thereof and who regained his possession under S. 9. of the Specific Relief Act after being ousted by another member, cannot, as against the latter, claim any mesne profits for the period he was out of possession.

*P. Nagabhushanam* for appellant.

*T. V. Seshagiri Aiyar* for respondent.

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1. (1901) I.L.R. 24 M. 358.

*Chief Justice*
*Miller* J. — S. A. 319 of 1905.
1908 Jan. 23

*Ryotwari holder's right to Government water—Obstruction by a third party—Action if maintainable—Injunction without proof of actual damage*

Where the defendant obstructed the plaintiff's water supply from a Government channel, damming up the channel at its source:—

*Held*, by the *Chief Justice*, that the defendant having, by his wrongful act, interfered with the plaintiff's enjoyment of his right—no matter whether contractual or real—plaintiff had a cause of action against him.

*Held* also, that under the circumstances, injunction was properly granted, though there was no proof of actual damage.

*Held* by *Miller* J.—Defendant's act being one necessarily calculated to cause damage, though it did not in fact cause damage, plaintiff having got water from another source, injunction was properly granted.

[*Quinn* v. *Leatham*[1] followed.]

*Ag. Advocate-General* (*P. S. Sivaswami Aiyar*) for appellant.

*T. V. Seshagiri Aiyar* and *R. Kuppusawmi Aiyar* for respondent.

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*Wallis* J.
*Sankaran Nair* J. — A. S. 147 of 1904.
1908 *Jan.* 24.

*Religious Endowments Act, S.* 14—*Not keeping accounts—Removal of trustee—Form of decree—Appointment of Receiver.*

Not keeping proper accounts is a sufficient ground for the dismissal of a trustee, whether under S. 3 or S. 4 of the Religious Endowments Act.

In decrees in suits under S. 14 of that Act, direction may be given for the appointment of a new trustee by a person or persons legally entitled thereto and for delivery of possession to such newly appointed trustee as incidental to the removal of the trustee.

[*Gianasambandha* v. *Kandasami*[2] followed.]

The damages awardable under that section should also be directed to be paid to such newly appointed trustee on behalf of

1. (1901) A. C. 495 2. (1887) I. L. R. 10 M. 375.

the trust. The Court may also appoint a Receiver to take charge of the property in the interim.

*T. R. Ramachandra Aiyar*, *T. R. Krishnasami Aiyar* and *G. S. Ramachandra Aiyar* for appellant.

*C. Ramachandra Rao Sahib* and *K. R. Subrahmanya Sastry* for respondent.

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*Chief Justice*
*Miller* J.
1908 *Jan.* 24.
S. A. 378 of 1905.

*C. P. C.*, *S.* 244—*Bar—Auction-Purchaser representative—Suit for possession.*

An auction purchaser (not being the decree-holder) is not a representative within the meaning of S. 244 C. P. C. so as to necessitate an application by him for delivery of possession under S. 318. S. 244 cannot be pleaded as a bar to a suit by the auction purchaser for possession.

*K. Narayana Rao* for appellant.

*T. V. Sheshagiri Aiyar* for respondent.

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*Chief Justice*
*Miller* J.
1908 *Jan.* 24.
S. A. 905 of 1905.

*Notice to quit—Inconsistent claims—Chalgeni or Mulgeni—Long occupation—Effect of.*

Notice to quit served upon all the adult male members of a Roman Catholic family (of brothers and sisters) in joint occupation of a Chalgeni holding is sufficient in law to determine the tenancy.

Combining a claim in ejectment after a notice to quit with a claim for rent for the period subsequent to the notice does not amount to a waiver of notice, though the claim for rent as such might be unsustainable.

Long occupation does not as a matter of law raise a presumption of Mulgeni or permanent tenure, though it is one of the circumstances to be taken into consideration in determining the question of fact, *viz.*, the nature of the tenancy.

*B. Sitarama Rao* for appellants.

*C. Ramachandra Rao Sahib* and *K. Ramanath Shenai* for respondents.

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*Wallis* J.
*Sankaran Nair* J. } A. S. 27 of 1904.
1908 *Jan.* 28.

*T. P. A., S.* 59 —*Execution of mortgage—Attestation, essentials of.*

The mortgagor should sign the mortgage document in the presence of the attesting witnesses. Mere acknowledgment of signature by the mortgagor in the presence of the attesting wittnesses is not sufficient.

*P. R. Sundara Aiyar* and *C. V. Ananthakrishna Aiyar* for appellant.

*T. R. Ramachandra Aiyar* and *T. R. Krishnasami Aiyar* for respondent.

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*Wallis* J.
*Sankaran Nair* J. } A. S. 62 of 1904.
1908 *Jan.* 28.

*T. P. A., Ss.* 59, 100—*Mortgage invalid as a mortgage— No charge.*

A mortgage invalid for want of proper attestation under S. 59, Transfer of Property Act, cannot be upheld to create a charge under S. 100.

*P. R. Sundara Aiyar* and *C. V. Ananthakrishna Aiyar* for appellant.

*T. R. Ramachandra Aiyar* and *T. R. Krishnasawmy Aiyar* for respondent.

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*Wallis* J.
*Sankaran Nair* J. } A. S. 113 of 1904.
1908 *Jan.* 28.

*Hindu Law — Maintenance — Widowed daughter-in-law— Refusal to live with husband during his life time no good plea in defence.*

A Hindu wife who, without sufficient cause, refused to live with her husband is not on that ground disentitled from

claiming after the death of the husband maintenance from the ancestral property in the hands of her father-in-law.

*P. R. Sundara Aiyar* for appellant.

*T. R. Ramachandra Aiyar* and *T. Ramachandra Rao* for respondent.

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*Wallis* J.
*Sankaran Nair* J. } A. S. 72 of 1906.
1908 *Jan.* 28.

*Trusts Act S.* 5—*Secret trusts—English law—Applicability.*

By operation of S. 5 of the Indian Trusts Act, the English law as to secret trusts in connection with wills is equally applicable to India.

*P. R. Sundara Aiyar* and *B. Sitarama Rao* for appellant.
*K. Narayana Rao* for respondent.

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*Wallis* J.
*Sankaran Nair* J. } A. S. 119 of 1904.
1908 *Jan.* 20.

*Hindu Law—Bequest in favour of daughter—Presumption as to whether she takes it absolutely—Will—Construction.*

There is no presumption in law that a bequest to a daughter gives her an absolute or limited estate.

*Held*, that a bequest in the following words "I give my property to my daughter * * * and she is to enjoy the same" in the circnmstances of the case conveyed an absolute estate.

*N. Ragagopala Chari* for appellent.

*S. Srinivasa Aiyar* and *T. V. Gopalaswami Mudaliyar* for respondents.

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*Miller* J.
} C. R. P. 440 of 1907.
1908 *Jan.* 28.

*Pauper application—S.* 409, *C. P. C.—Merits*

Where an application for leave to sue *in forma pauperis* had been rejected on the ground that the petitioner had not a *prima facie* good case:—

*Held*, that it was not open to the Judge, when considering the pauper application, to go into the merits and prejudge the case.

*H. Balakrishna Rao* for petitioner.

*V. Purushottam Aiyar* for respondents.

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*Benson* J.
*Munro* J.
1908 *Jan.* 31.
C M. A. 120 of 1907.

*Limitation Act, Art.* 169—*Service of notice of appeal under S.* 80, *C. P. C.*—*No declaration under S.* 82—*Not applicable.*

Art. 169 of the Limitation Act has no application to cases where notice of an appeal is served on the respondent under S. 80, C. P. C., and the Court by inadvertence omits to make a declaration such as is contemplated by S 82, C. P. C.

*T. Subrahmanya Iyer* for appellant.

*Rajagopala Iyengar* for respondent.

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*Chief Justice*
*Miller* J.
1908 *Jan.* 31.
S. A. 1, 2 & 3 of 1905.

*Suit by reversioner—Alienation by widow good only in part—Suit for declaration maintainabls.*

Where a reversioner sues for a declaration that an alienation by a widow is not binding against him after her lifetime, a declaration may properly be granted that the property is redeemable by the reversioner on the death of the widow on payment of that portion of the consideration which is found binding against the estate.

*L. A. Govindaraghava Iyer* for appellant.

*K. Srinivasa Iyengar* for respondent.

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*Benson* J.
*Munro* J.
1907 *Dec.* 12.
S. A. 294 of 1905.

*Alienation by widow—Debt of the husband—Other funds available to the knowledge of the alienee—No charge.*

Where an alienee from a widow knew that the widow had sufficient funds of her husband in her hands to pay the debt for

which the alienation purports to be effected, the alienation cannot be upheld so as to create a charge to the extent of the debt.

*The Hon'ble the Advocate General* (*P. S Sivaswami Aiyar*) for appellant.

*T. V. Seshagiri Iyer* and *K. Ramachandra Iyer* for respondent.

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*Munro* J.
1908 *Feb.* 11 } C. R. P. 431 of 1907.

*Oath-Agreement—Subsequent withdrawal for no valid reason—Oath taken notwithstanding—Not binding.*

A party is not bound by an oath taken subsequently to his withdrawal from the agreement to abide by the oath even though such withdrawal was for no valid and sufficient reason.

[*Majad* v. *Pathu Kutti*[1] followed.]

*T. V. Gopalasami Mudaliyar* for petitioner.

*T. Natesa Aiyar* for respondent.

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*Munro* J.
1908 *Feb.* 11. } C. R. P. 441 of 1907.

*Conditional remission—Provision to pay the remitted amount on default—No penalty—Strict performance essential.*

In a suit for money a compromise was arrived at between the parties by which on the plaintiff agreeing to remit a portion of the amount found due, the defendant agreed to pay the balance at a certain future date with interest; and in default to pay the full amount so found due. On the due date, the principal was paid in, but there was an omission to pay the interest which, however, was a trifling amount. Plaintiff contended that there was a default and that he was entitled to the full amount.

*Held*, that the provision was not penal and therefore could not be relieved against. A strict compliance with the terms of the agreement is essential.

*T. R. Venkatrama Sastri* for petitioner.

*A. S. Balasubrahmanya Aiyar* for respondent.

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1. (1907) 17 M. L. J. 545

*Chief Justice.*
*Sankaran Nair* J.
1908 *Feb.* 17.
} S. A. 506 of 1905.

*Mortgage—Redeemable at the end of any year within* 15 *years —Limitation.*

Where in a mortgage-deed it was provided that the mortgaged property was to be restored to the mortgagor on payment of the mortgage money at the end of any year within 15 years :—

*Held*, that under Art. 148, Limitation Act, time began to run from the end of the first year.

*P. R. Sundara Iyer* and *B. Sitarama Rao* for appellant.

*K. Ramanatha Shenoi* and *K. P. Madhava Rao* for respondent.

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*Wallis* J.
*Munro* J.
1908 *Feb.* 13.
} S. A. 131 of 1905.

*Notice to quit—*15 *day's notice unreasonable—Inaction after for six months—Disclaimer.*

In the case of an agricultural lease, 15 days' notice expiring in the midst of the cultivation season is not a reasonable notice. The fact that six months actually elapsed before suit does not signify. A disclaimer in order to dispense with the necessity for notice must be a disclaimer before suit.

[*Kizakkinayakatt Abdulla Naha* v. *Moidin Kutti* [1] dissented from. *Unhanna Devi* v. *Vaikunta Hegde* [2] followed.]

*P. R. Sundara Iyer* and *C. V. Ananthakrishna Iyer* for appellant.

*T. Subramanya Iyer* for respondent.

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*Wallis* J.
*Munro* J.
1908 *Feb.* 13.
} S. A. 253 of 1905.

*Hindu Law—Liability of son—Declaration of non-liability under mortgage, effect of.*

In a suit upon a mortgage executed by the father, son's shares were exempted from liability on the ground that the mortgage

1. (1907) 17 M. L. J. 287. 2. (1893) I. L. R. 17 M. 218.

was not executed for family necessity but a decree was passed against the father personally as well as against his share in the family property. In discharge of his liability under the decree the father gave a fresh mortgage upon which the present suit was brought.

*Held*, in the absence of any finding in the previous suit negativing the son's Hindu Law liability for the debt of the father a decree could be validly passed for the sale of the whole family property.

[*Shiam Lal* v. *Ganesh Lal*[1] followed.]

*T. Subrahmanya Iyer* for appellant.

Respondents unrepresented.

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*Benson* J.
*Miller* J.
1908 *Feb.* 5.
} Cr. Rev. Case No. 385 of 1907.

*Cr. P C., S. 488—Discretion—Single act of adultery—Communication—Effect of.*

The Magistrate has a discretion under Cl. (1) of S. 488 Cr. P. C., and the discretion is properly exercised against the wife who has been excommunicated for an act of adultery with a man of low caste when association by the husband with her would entail his degradation from caste, though it may be she was guilty of only one single act of adultery.

*T. Subrahmanya Iyer* for petitioner.

*T. Narasimha Iyengar* for respondent.

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1. (1905) I.L. R. 28 A. 288.

## NOTES OF RECENT CASES.

*Chief Justice.*
1908 *Feb.* 11.
Insolvency Application 181 of 1906 (J. D. Mayne's claim).

*Contract Act, Ss.* 170, 221—*Banker—No balance of account—Securities left for collection—No lien.*

In the absence of any general balance of account a banker has no lien on any securities left with him for collection and claimed by the owner, any amount which the banker is entitled to charge for work done by him in connexion with the securities being claimable in a separate suit.

*C. E. Odgers* for claimant.

*The Official Assignee* for insolvent.

*Chief Justice.*
*Sankaran Nair* J.
1908 *Feb.* 14.
S. A. 570 of 1905.

*S.* 317, *C. P. C.—Assignee from certified purchaser—No bar.*

S. 317, C. P. C., does not bar a suit against the assignee from a certified purchaser.

[*Theyyavelan* v. *Kochan*[1] followed.]

*Joseph Satya Nadar* for appellant.

*S. Srinivasa Aiyar* for respondent.

*Chief Justice.*
*Sankaran Nair* J.
1908 *Feb.* 18.
S. A. 966 of 1904.

*C. P. C., S.* 559—*Party in the first Court not party in first or second appeal—Added as party in second appeal.*

Persons who were defendants in the Munsif's Court but not made parties in the first or second appeal and whose presence was thought necessary for disposing of the second appeal were ordered by their Lordships to be added as respondents in second appeal.

*T. V. Seshagiri Aiyar* for appellant.

*J. L. Rosario* for *T. Rangachari* and *C. Aiyaswami Sastri* for respondent.

1. (1897) I. L. R. 21 M. 7.

*Chief Justice.*
*Sankaran Nair* J.
1908 *Feb.* 19.

S. A. 1295 of 1905.

*C.P.C., S.* 13—*No res-judicata where rights are reserved—Such decree is irregular.*

A decree giving possession of property to plaintiff subject to any rights which the defendant might thereafter establish is irregular and cannot operate as *res judicata* against the defendant.

*V. Viswanadha Shastry* for appellant.

No one appeared for the respondent.

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*Wallis* J.
*Munro* J.
1908 *Feb.* 19.

C. M. A. 199 of 1907.

*Order under S.* 7—*Succession Certificate Act—Agency Court at Vizagapatam—Appeal lies to the High Court under S.* 19.

An appeal lies to the High Court from an order passed by the Governor's Agent at Vizagapatam under S. 7 of the Succession Certificate Act.

[*Chakrapani* v. *Varahalamma*[1] dissented from.]

*B. Sitarama Rao* for appellant.

*C. R. Tiruvenkatachariar* for respondent.

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*Wallis* J.
1908 *Feb.* 21.

Cr. R. C. 474 of 1907.

*Cr. P. C., S.* 117—*Joint inquiry—Dealing with both the contending parties in the same inquiry—Illegal.*

S. 117, Cl. (4) Criminal Procedure Code, does not empower the Magistrate to deal with both the contending parties to an apprehended breach of the peace in the same inquiry. Such a joint inquiry, if held, is not a mere irregularity but a breach of an express provision of the law within the meaning of the rule laid down in *N. A. Subrahmanya Iyer* v. *King-Emperor*[2] and as such is wholly illegal.

[*Kamal Narain Chowdry* v. *The Emperor*[3] and *Pran Krishna Saha* v. *The Emperor*[4] followed.]

*K. Ramanath Shenoi* for petitioner.

*The Public Prosecutor* (*E. B. Powell*) for the Crown.

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1. (1894) I. L. R. 18 M. 227.
2. (1901) I. L. R. 25 M. 61 (P. C.)
3. (1907) 11 C. W. N. 472.
4. (1903) 8 C. W. N. 180.

*Benson* J.
*Miller* J.
1908 *Feb.* 25.
} A. S. 157 of 1905.

*Hindu Law—Succession—Heirs—Preference—Contest between paternal aunt's son's son and daughter's daughter—Title and possession under a deed—' Can't approbate and reprobate.'*

Under the Hindu Law of Southern India a daughter's daughter is a remoter heir than a paternal aunt's son's son.

If one gets possession under a deed or will, he cannot afterwards set up a title to his possession different from that given to him by the deed or will.

*T. V. Seshagiri Aiyar* and *P. Nagabhushanam* for appellants.

*Sir V. Bhashyam Aiyangar, V. Krishnaswami Aiyar* and *C. R. Tiruvenkatachari* for respondents.

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*Benson* J.
*Miller* J.
1908 *Feb.* 25.
} A. S. 98 of 1904.

*Hindu Law—Appointment of a daughter to beget a son—Obsolete—Gift to donee not in existence—Validity of.*

The custom of appointing a daughter to beget a son is obsolete. Under the Hindu Law a donee must be a person in existence at the time the gift takes effect.

*T. V. Seshagiri Aiyar* and *P. Nagabhushanam* for appellants.

*Sir V. Bhashyam Aiyangar, V. Krishnaswami Aiyar* and *C. R. Tiruvenkatachariar* for respondents.

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*Benson* J.
*Miller* J.
1908 *Feb.* 25.
} Ap. 39 of 1905.

*T. P. Act, S.* 85*—Parties under—Mortgagee releasing part of mortgaged property—Right to proceed against the rest only for a proportionate share.*

A person against whom and whose properties no relief is prayed for need not be added as a party under S. 85, T. P. Act.

If a mortgagee releases a part of the mortgaged property from liability to pay the mortgage debt he can charge the rest of the mortgaged properties only rateably.

*S. Muthia Mudaliar* for appellant.

*T. Subramania Aiyar* for respondent.

*Benson* J.
*Miller* J.
1908 *Feb.* 27.
C. M. P. 1465 and 1466 of 1907.

*Cr. P. C., S.* 195 *Cl. (b)—Extension of time for sanction—Application after expiry of time.*

Their Lordships extended the time for sanction on an application made after six months, overruling the objection of the respondent that no application filed after the expiry of the time can in law be granted as held in *Kali Kinkar Sett* v. *Dinobandhu Nandy.*[1]

[Cf. *In re Muttukudam*[2] and *Karuppana* v. *Sinna Gounden.*[3] – Ed].

*T. V. Muthukrishna Aiyar* for petitioner.

*C. V. Anantakrishna Aiyar* for respondent.

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*Chief Justice.*
*Miller* J.
S. A. 177 of 1904.

*Suit by puisne mortgagee—First mortgagee purchaser—Accounts on the footing of the mortgage.*

In a suit brought by the second mortgagee upon his mortgage against the first mortgagee who had purchased the property in execution of a decree upon his mortgage to which the plaintiff was not a party :—*Held* the proper decree to be passed is one directing the plaintiff to redeem the first mortgagee and on his so doing, the first mortgagee, as purchaser of the equity of redemption, to be at liberty to redeem the plaintiffs, accounts to be taken on the footing of the mortgage and not on the footing of the decree as held in *Gangadas Bhattar* v. *Jogendra Natha Mitter*[4], the first mortgagee, however, to give credit for the amount of mesne profits he had received out of the property. [*Umes Chunder Sircar* v. *Zahur Fatima and others*[5] followed].

*K. Srinivasa Iyengar* for appellant.

*K. Ramachandra Aiyar* for respondent.

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1. (1905) I. L. R. 32 C. 379.
2. (1902) I. L. R. 26 M. 190.
3. (1902). I. L R. 26 M. 480.
4. (1907) 11 C. W. N. 403.
5. (1890) I. L. R. 18 C. 164. (P. C.)

## NOTES OF RECENT CASES.

*Wallis* J.
*Munro* J.
1908 *March* 9.
S. A. 247 of 1907.

*S.* 7, *Rent Recovery Act—Agreement to dispense with certain terms.*

Where it was alleged that there was an agreement between the landlord and the tenant that the patta need not mention certain customary dues recoverable with the rent :—*Held*—S. 7, Rent Recovery Act, does not contemplate an agreement to dispense with some only of the terms of a patta.

*The Advocate General* (*P. S. Sivaswami Aiyar*) and *T. V. Gopalaswami Mudaliyar* for appellant.

*A. S. Balasubramanya Aiyar* for respondent.

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*Wallis* J.
1908 *March* 11.
S. A. 982 of 1904.

*Res Judicata—Claim as reversioner—Grounds different.*

The plaintiff, a reversioner, having failed to establish in a previous suit for possession that his father was the adopted son of a brother of the last male owner, now sued on the footing of his being the sister's grandson.

*Held* by *Wallis* J. agreeing with *Miller* J. and differing from the *Chief Justice*, that the suit was barred by *res judicata.*

*T. Natesa Aiyar* for appellant.

*R. Kuppusawmi Aiyar* for respondent.

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*Benson* J.
*Munro* J.
1908 *March* 18.
S. A. 378 of 1905.

*Security bond—Affecting immovable property—Registration.*

A security bond given to the Court under S. 545, C. P. C., requires registration if it is to affect immovable property.

[*Tokhan Singh* v. *Girivan Singh*[1] followed].

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1. (1905) I. L. R. 32 C. 494.

*Ethiraja Mudaliyar* for appellant.
*V. V. Srinivasa Aiyangar* for respondent.

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*Benson* J.
*Munro* J.
1908 *March* 18.
S. A. 1076 of 1906.

*Malabar Tenants Compensation Act—Act I of* 1900, *S.* 19—*Contract negativing tenant's right to cut trees.*

A contract between the Jenmi and Kanomdar in 1889 that the Kanomdar ought not to cut the trees planted by him and that if he should do so, he should pay the value of the trees so cut to the Jemmi is not invalidated by S. 19 of the Malabar Tenants Compensation Act.

*C. V. Ananthakrishna Aiyar* for appellant.
Respondent unrepresented.

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*Benson* J.
*Munro* J.
1908 *March* 18.
Ref. 18 of 1907.

*Presentment of a cheque—Reasonable time—Question of fact—Reference under the Presidency Small Cause Courts Act.*

Whether a cheque has been presented within a reasonable time is a question of fact and not a proper subject of reference to the High Court under the Presidency Small Cause Courts Act

*T. Richmond* for plaintiff.
*J. L. Rosario* for defendant.

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(*Full Bench.*)
*Chief Justice.*
*Wallis* J.
*Sankaran Nair* J.
1908 *March* 12.
S. A. 1158 and 1250 of 1904.

*Hindu Law—Widow—Alienation—Surrender—Consent of reversioners for consideration—When valid against actual reversioners.*

*Chief Justice* and *Sankaran Nair* J.—A surrender or alienation by a Hindu widow must be of the whole estate possessed by the widow.

*Chief Justice* and *Wallis* J.—The reversioners could not, in order to enable the widow to give an absolute estate to

property inherited from her husband give the widow a general release of their reversionary right. The actual reversioner is bound by the consent given by his father, the presumptive reversioner, where it is given *bona fide* and for consideration with respect to future alienations.

*Wallis* J.—The effect of *Bajrangi Singh* v. *Manokarmika Baksh Singh*[1] would seem to be to overrule *Maruda Muthu Nadan* v. *Srinivasa Pillai* [2] in which it was held that partial alienations are invalid when made with the consent of next reversioners. The widow's power of acceleration and the reversioner's power of validating widow's alienation are distinct and independent powers.

*Sankaran Nair* J.—Consent to alienation may be for a consideration. If the actual reversioner gets the benefit of the consideration received by the presumptive reversioner he cannot impeach the validity of the assent.

*Joseph Satya Nadar* and *M. B. Doraiswami Aiyangar* for appellants.

*T. T. Tiruvenkatachari* for respondents.

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*Boddam* J.
*Munro* J.
1908 *March* 23.
} S. A. 242 of 1906.

*Hindu Law—Gift to daughter-in-law—Construction—Condition to perform obsequies of the donor and his wife.*

Construing a deed of gift, executed by a father-in-law in favour of his widowed daughter-in-law, in the following terms : " As I have given as a gift to you the house, you shall not subject the same to any kind of encumbrance so long as myself and my wife are alive. You shall after performing the obsequies of myself and my wife possess and enjoy the house from generation to generation. I have this day delivered over to your enjoyment the house. Myself and my wife shall not encumber the house"; it was *held* that no absolute estate was intended but that it was conditional upon the donee surviving and performing the funerals of the donor and his wife.

*T. R. Ramachandra Aiyar* and *T. V. Gopalaswami Mudaliar* for appellant.

*N. Rajagopalachari* for respondent.

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1. (1907) 17 M. L. J. 605 (P.C.)   2. (1897) I.L.R. 27 M. 128 (F.B.)

*Benson* J.
*Sankaran Nair* J. } L. P. A. 49 of 1907.
1908 *March* 26.

*Hindu Law—Joint family—Promissory note by Manager alone for family purposes—Other members bound by the note.*

On a negotiable instrument executed by the Manager alone of a joint Hindu family for a purpose binding upon the family, the other members of the family are also liable.

*Krishna Ayyar* v. *Krishnaswami*[1] is not dissented from in *Subba Narayana* v. *Ramasami.*[2]

*N. Rajagopalachari* for appellant.

*A. S. Balasubramania Aiyar* for respondent.

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*Chief Justice.*
*Boddam* J. } S. A. 19 of 1907.
1908 *March* 31.

*Evidence Act*, *S.* 91—*Unregistered permanent lease—Admissibility of other evidence to prove the character of possession.*

An unregistered deed of permanent lease is inadmissible in evidence ; S. 91 of the Evidence Act does not debar the admissibility of evidence *aliunde* to prove the character of the possession such a lessee had.

[*Subbaya* v. *Madduletiah*[3] followed.]

*T. R. Venkatarama Sastri* for appellant.

*C. Narasimhachari* for respondent

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(*Full Bench.*)
*Chief Justice,*
*Benson*, *Boddam*,
*Wallis* and *Sankaran Nair* JJ. } Crl. Revn. 149 of 1908
Crl. M. P. 72 of 1908.
1908 *March* 31.

*Cr. P. C.*, *Ss.* 107, *cl*(4), and 496.

A District Magistrate or Chief Presidency Magistrate has no power under S. 107 (cl. 4) Cr. P. C. to arrest a person who has not been sent to him under S. 107 (cl. 3), Cr. P. C.

Under S. 496, Cr. P. C., a Magistrate is bound to let on bail a person who is not accused of a non-bailable offence.

*T. Rangachari*, *P. Narayanamurthi* and *C. S. Govindaraja Mudaliar* for petitioners.

*C. F. Napier* for the *Public Prosecutor.*

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1. (1900) I.L.R. 23 M. 597. 2. (1906) I.L.R. 30 M. 88 (F.B.)
3. (1907) 17 M.L.J. 469.

## NOTES OF RECENT CASES.

*Wallis* J.
*Munro* J.
1908 *April* 9. } S. A. 773 of 1906.

*Limitation Act, Art.* 11—*Applicable only as between parties to the order—Benamidar-auction-purchaser and real purchaser.*

Art. 11 of the Limitation Act applies only as between parties to the order sought to be set aside. In a suit for possession brought by the claimant against a benamidar-auction-purchaser in whose favour there has been an order under S. 335, C. P. C., it is not open to the real purchasers to plead that when they were brought on record the limitation provided by Art. 11 had already expired.

*K. Ramachandra Aiyar* for appellent.

*T. V. Seshagiri Aiyar* for respondent.

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*Boddam* J.
*Munro* J.
1908 *April* 1. } S. A. 115 of 1907.

*Contract to sell on behalf of a minor—Sale for a higher price—Delay—Effect of.*

A contract to sell immovable property entered into on behalf of a minor is binding on the minor if it is proved to be for his benefit. The fact that a person who was not willing, at the time of the plaintiff's agreement, to purchase for the plaintiff's price, subsequently purchases for a higher price, is no ground for refusing specific performance at the instance of the plaintiff. In the absence of anything to show an abandonment or a sleeping over rights to the detriment of third parties, delay short of limitation period does not matter in suits for specific performance.

*T. R. Ramachandra Aiyar* for appellant.

*P. R. Sundara Aiyar* and *M. B. Doraswami Aiyangar* for respondent.

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*Chief Justice.*
*Sankaran Nair* J.
1908 *April* 23. } S. A. 878 of 1905.

*Conveyance of the whole estate to reversioner—Re-conveyance of a part by the latter—Valid surrender notwithstanding.*

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A widow conveyed her whole estate to the then reversioner, the latter at the same time undertaking to convey a large portion of the same to the widow's brother. He did also so convey. In a suit by the actual reversioner to recover his property after the death of the widow :

*Held* that the transaction was binding on the actual reversioner. There being a valid surrender of the widow's estate, the motive that led to the surrender is immaterial.

*T. V. Seshagiri Aiyar* for appellant.

*T. T. Tiruvenkatachariar* for *P. Ananda Charlu* for respondent.

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*Boddam* J.
*Munro* J. } S. A. 175 of 1905.
1908 *April* 14.

*Hindu Law—Agreement to divide—Movables actually divided —No division by metes and bounds of immovables—Divided status notwithstanding.*

There was an agreement between the members of an undivided Hindu family to divide the family property; in pursuance of this agreement, movables belonging to the family were actually divided. There was also separate messing, enjoyment of the income of the immovable property of the family in shares. But there was no actual division, because the parties could not agree as to the exact mode of division.

*Held* under these circumstances, the question of the status of the family in respect of the immovables was a question of law, and that the status became a divided one from the date of the agreement. [But the second appeal was dismissed on the ground that the claim was bad as being one for partial partition.]

*T. V. Sheshagiri Aiyar* for appellant.

*T. Rangachariar* for respondent.

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*Munro* J.
1908 *April* 15. } C. .P C. 439 of 1907.

*Art.* 62, *Limitation Act—Starting time.*

Plaintiff, a decree-holder attached a decree in favour of his judgment-debtor. The defendant put in a claim saying that he was an assignee. His claim was upheld and the decree was realised by him. In a suit by the plaintiff, it was held by the District

Judge on appeal, reversing the decree of the Munsiff, that the assignment was not binding as against the plaintiff. The present suit was brought for the recovery of the decree amount realised by the defendant more than 3 years from that date but within that period from the decree of the High Court confirming the decree of the District Court.

*Held*: Art. 62 of the Limitation Act applied, and time ran from the date of the decree of the District Judge.

*S. Vencatachari* for petitioner.

*V.C. Seshachariar* for respondent.

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*Wallis* J.<br>*Munro* J.<br>1908 *April* 22. } C. M. A. 97 of 1907.

*S. 230, C. P. C.—Agreement to take a decree-debt in instalments—Court's order sanctioning—Limitation from the date of the decree.*

A decree-holder agreed with the judgment-debtor to remit a portion of the decree-debt and also to take the balance in instalments but in case of default of any instalment the whole was to become payable. The Court sanctioned the agreement.

*Held* for purposes of S. 230, C. P. C, time is to be calculated from the date of the decree and not from the date of the order of the Court sanctioning the agreement. The Court's order sanctioning the agreement does not amount to an order directing the payment of money at a certain future date within the meaning of that section.

*C. V. Anantakrishna Aiyar* for appellant.

*L. A. Govinda Raghava Aiyar* and *S. Venkatachari* for respondent.

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*Wallis* J.<br>*Munro* J.<br>1908 *April* 27. } C. M. A. 62 of 1907.

*Compromise decree—No sanction under S. 462, C. P. C.—Question not to be gone into in execution.*

It is not competent to the Court executing a decree to go into the question whether there was Court's sanction under S. 462, C. P. C., for the compromise which formed the basis of the decree.

*C. V. Anantakrishna Aiyar* for appellant.

*L. A. Govinda Raghava Aiyar* and *S. Venkatachari* for respondent.

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*Benson* J.
*Miller* J.
1908 *April* 24. } A. S. 55 and 56 of 1904.

*Pensions Act, S.* 4—*C. P. C., S.* 11—*Grant by Government for religious purposes—Suit concerning—Maintainability of—Resumption of Inam—Grounds for.*

A suit in respect of a money grant made by the Government for religious purposes is cognisable by Civil Courts.

[*Venkateswara* v. *Secretary of State*[1] followed.]

Resumption of a service Inam may be justified on grounds other than those alleged at the time of the resumption just as a master can justify the dismissal of a servant on grounds other than those he gave at the time of the dismissal.

*The Hon'ble the Advocate-General* (*P. S. Sivaswami Aiyar*) for the appellant.

*E. V. R. Sarma* for respondent.

[FULL BENCH.]
*Chief Justice.*
*Miller* J.
*Munro* J.
1908 *May* 8. } C R. P. 599 and 600 of 1905.

*Promise to pay bride price—Against public policy—Void under all circumstances.*

An agreement to pay money in consideration of the promisee giving his daughter in marriage to the promisor is against public policy and void irrespective of the circumstances under which the contract was entered into.

*E. V. R. Sarma* for petitioner.

*K. Subrahmania Sastri* for counter-petitioner.

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*Wallis* J.
1908 *May* 1. } C. R. P. 481 of 1907.

*Lease—Estoppel—Benamidar lessee—Evidence Act, S.* 116.

In a suit against the lessee by the ostensible lessor, the lessee is not estopped from contending that the latter is only a benamidar and as such is not entitled to maintain the suit against

1. (1907) I. L. R. 31 M. 12.

him. The rule of estoppel under S. 116, Evidence Act, operates only in favour of the real lessor.

*T. Natesa Aiyar* for petitioner.

*T. R. Venkatrama Sastri* for respondent.

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*Chief Justice.*<br>*Benson* J.<br>1908 *April* 30. } S. A. 894 of 1905.

*Landlord and Tenant—Forfeiture—Intention to determine tenancy.*

The landlord before he sues his tenant in ejectment on a forfeiture for non-payment of rent, ought to indicate by an overt act, his intention to determine the tenancy. A suit brought without so previously indicating the intention to determine the tenancy ought to be dismissed.

*B. Sitarama Rao* for appellant.

*K. Ramanath Shenoi* for respondent.

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*Chief Justice.*<br>*Miller* J.<br>1908 *May* 4. } S. A. 524 of 1905.

*Easements Act, S.* 13, *Cl.* (*a*) *and* (*d*)—*Easements of convenience—Right of drainage.*

Easements under Cl. (*a*) *and* (*d*) of S. 13 include easements of convenience, such as a right of drainage through a defined channel.

*T. R. Venkatrama Sastri* for appellant.

*S. Gopalasawmi Aiyangar* for respondent.

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*Chief Justice.*<br>*Miller* J.<br>1908 *April* 7. } O. S. Ap. 31 of 1907.

*Letters Patent, Cl.* 15—*Judgment—Appeal—Order directing plaintiff to advance money for conduct of a minor defendant's case.*

No appeal lies against an order which directs the plaintiff to provide the guardian of a minor defendant with funds to enable him to conduct the litigation on behalf of the minor.

[*Kuppusami Chetty* v. *Ratnavelu Chetty* [1] followed.]

1. (1901) I. L. R. 24 M. 511.

*P. Ananda Charlu* and *P. V. Ramachandra Raju* for appellant.

*C. Venkatasubbaramiah* for respondent.

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*Chief Justice.*
*Miller* J. } Ap. 208 of 1905.
1908 *April* 8.

*C. P. C.*, S. 561—*Withdrawal of appeal—Memo of objections—Costs of—Rule* 113, *Civil Rules of Practice.*

The Court has jurisdiction to award costs to a respondent on the memorandum of objections, even in cases where the appeal is withdrawn.

*T. V. Seshagiri Aiyar* for appellant.

*S. Srinivasa Aiyangar* for respondent.

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*Boddam* J.
*Munro* J. } SA. 199 of 1907.
1908 *April* 14.

*Sale—Benami—Consideration paid by another—Onus—Shifting of onus.*

In a suit by the daughters for possession of some properties that were bought in their mother's name but were sold by their father after the mother's death, it having been found that the father bought the properties with his own money in plaintiffs' mother's name : *Held* that though the onus of proving that the properties stood only benami in the mother's name was on the vendees, that having been shifted by proof as regards consideration, the onus of proving that they were gifted by the father to the mother lay on the plaintiffs.

*T. R. Ramachandra Aiyar* for appellant.

*T. V. Gopalasawmi Mudaliar* for respondent.

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*Benson* J.
*Boddam* J. } C. Rev. 435 of 1907.

*Cr. P. C.*, *S.* 145—*Jurisdiction—Disputes in a joint Hindu family.*

Disputes between the members of a joint Hindu family are not taken away from the purview of S. 145, Cr. P. C., and the possession of the manager can be confirmed by an order under the section.

[*Mohun Thakur* v. *Narsing*[1] followed.]

*V. Ramesam* for petitioner.

*Percy Grant* for *Public Prosecutor* and *G. Krishnaswami Aiyar* contra.

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*Wallis* J.
*Munro* J.
1908 *April* } S. A. 213 of 1905.

*Mortgage—Payment of, by person without title—Subrogation —Right to.*

A person in possession of property whose title to the same has been found against later on, paying a mortgage existing thereon is entitled to subrogation at the hands of the person to whom the title thereto is found to have validly passed.

*P. Naranayanamurthi* for appellant.

*P. Nagabushananam* for respondent.

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*Benson* J.
*Miller* J.
1908 *April* 24. } S. A. 1087 of 1905.

*Suit in ejectment—Proof of title only for two-thirds—No amendment of plaint even after objection—No relief for partition and delivery of two-thirds.*

Where in a suit in ejectment as regards all the suit lands plaintiff did not, even after objection in the written statement, amend his plaint for partition and delivery of two-thirds of the suit property to which alone he wa sfound entitled:

*Held* that plaintiff ought not to be given a decree in second appeal even for the two-thirds.

[*Ramchandra* v. *Vasudev*[2] followed.]

*C. R. Tiruvenkatachari* for appellant.

*K. Ramachandra Aiyar* for respondent.

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*Benson* J.
*Sankaran Nair* J.
1908 *March* 31. } S. A. 250 of 1906.

*Defamation—Accused person Reply notice—Publication not set up in plaint.*

The rule of English law that parties, witnesses and counsel are not liable for defamation extends also to accused persons.

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1. (1899) I. L. R. 27 C. 259.
2. I. L. R. 10 Bom.

Plaintiff in a suit for defamation cannot rely upon a publication not set up in the plaint. The defendant is not liable for defamatory statements contained in a notice sent by him in reply to the one sent by the plaintiff, when those statements are strictly relevant to the dispute between them.

*K. NarayanaRow* and *G. Annaji Rao* for appellant.

*V. C. Seshachariar* for respondent.

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*Boddam* J.
1908 *March* 19. } Cr. Rev. P. 52 of 1903.

*I. P. C., S.* 339—*Wrongful restraint—Verbal remonstrance.*

A mere verbal remonstrance not to proceed unaccompanied by any physical force will not constitute wrongful restraint.

*V. N. Kuppu Row* for petitioner.

*Public Prosecutor (E. B. Powell)* for the Crown.

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*Wallis* J.
*Munro* J.
1908 *April* 28. } C. M. S. A. 51 and 52 of 1907.

*C P. C., S.* 244—*Representative—Mortgagee representative of motgagor—Appeal.*

A mortgagee is a 'representative' of the mortgagor as regards the land mortgaged, so that any contest in execution of any money decree against the mortgagor between the mortgagee and holders of decrees for money against the mortgagor as to who is entitled to get money deposited in Court to the credit of the mortgagor in respect of the land is one under S. 244, C. P. C., and an appeal lies from any order made therein.

[*Narayanasami* v. *Seshappier*[1] followed.]

*J. L Rosario* for appellant.

*K. P. Govinda Menon* for respondent.

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*Benson* J.
*Miller* J.
1908 *April* 22. } Cr. Ap. 72 of 1008.

*Cr. P. C., S.—Misdirection to the Jury—No reference in the charge to the Jury of the plea or the evidence for the defence.*

Where a Judge did not refer in his charge to the Jury to the plea or the evidence of the defence, their Lordships held that there was a misdirection and that a new trial was necessary.

*T. Prakasam* for appellant.

*Percy Grant* for *Public Prosecutor* for the Crown.

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1. (1907) 17 M. L. J. 321.

## NOTES OF RECENT CASES.

*Wallis* J.
*Munro* J.
1908 *April* 28.
C. R. P. 553 of 1907.

*Highway—Partial obstruction of—Nuisance—Abatement of—Right to, for a member of the public.*

It is serious obstruction and nuisance to a highway to leave a carriage to occupy 10 out of 17 feet of a road. It is no defence to say that there was enough of room for a carriage to pass and repass ; the public are entitled to the whole width of the road. One of the public can abate the nuisance by removing the carriage.

*K. N. Aiya Aiyar* for petitioner.

*K. Narayana Row* for respondent.

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*Benson* J.
*Wallis* J.
1908 *May* 6.
S. A. 614 of 1905.

*S. 13, Civil Procedure Code—Suit for mesne profits—Previous suit for possession no bar.*

S. 43, C. P. C., does not prevent a person suing a trespasser for possession from subsequently suing him for mesne profits.

*V. Ramesam* for appellant.

*T. Prakasam* for respondent.

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*Chief Justice.*
*Wallis* J.
1908 *May* 7.
S. A. 82 of 1905.

*C. P. C., S. 559—Judgment to the prejudice of persons not parties.*

A person who is not a respondent in an appeal, and against whom no relief is prayed for by the appellant is not a person interested in the result of the appeal and no judgment to his prejudice can be given in the appeal.

*T. R. Ramachandra Aiyar* and *K. B. Ranganada Aiyar* for appellant.

*Advocate-General (P. S. Sivaswami Aiyar)* for 1st respondent.

*L. Narayana Aiyar* for 3rd, 5th and 7th to 9th respondents.

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*Chief Justice.*
*Wallis* J. } S. A. 263 of 1905.
1908 *May* 7.

*Limitation Act, Arts.* 83, 113 *and* 116—*Breach of covenant for title—Special covenant to indemnify.*

An exchange deed in writing registered after covenanting for good title provided that if disputes arise regarding any of the properties exchanged each party will be answerable out of his other properties. In a suit after 3 years, but within 6 years, from the date of dispossession and after 20 years from the date of the exchange, by one of the parties for damages for dispossession in a dispute between the other party to the deed and a stranger:

*Held* (1) that this is not a suit for specific performance under Article 113 but a suit for damages coming under Art. 116 of the Limitation Act; (2) though ordinarily cause of action for breach of covenant for title might arise on the date of the deed, the presence of special covenant to be answerable from other properties on dispossession gives a period of six years from the date of dispossession.

*S. Subramania Iyer* for appellants.

*T. V. Seshagiri Aiyer* for 3rd respondent.

*T R. Venkatarama Sastri* for 1st respondent.

*S. Rajagopala Aiyangar* for 1st and 2nd respondents.

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*Benson* J.
*Wallis* J. } S. A. 1110 of 1905.
1908 *May* 7.

*C. P. C.*, Ss. 520, 522—*Award—Remittal of award to arbitrators—Revised award—Appeal against—Competency of.*

No appeal lies against a decree on revised award given after remitting the original award on the ground that the order remitting is illegal. The award mentioned in the last clause of S. 522 is the revised award includes whenever the first award has been remitted.

*S. Muthia Mudaliar* for appellant.

*A. S. Balasubramania Aiyar* for respondent.

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# NOTES OF RECENT CASES.

*Benson* J.
*Wallis* J.
1908 *May* 7. } S. A. 550 of 1905.

*Karnavan—Appointment of—Ignoring once of some person's rights to be Karnavan—Effect of.*

If a person who might have been appointed as Karnavan is once ignored on some ground or other and another is appointed, he is not entitled to be appointed Karnavan when the Karnavanship again falls vacant.

*K. R. Subramania Sastry* for appellant.

*K. Narayana Row* for respondent.

*Benson* J.
*Wallis* J.
1908 *July* 20. } O. S. Ap. 1 of 1908.

*Banker and Customer—Negotiation to open a fixed deposit account—Sending only a portion of the amount of deposit—Insolvency of Bank—Mutual relationship.*

A person expressing a wish to make a fixed deposit of Rs. 1,100 with a bank, sent Rs. 600; and the only intimation he then made was that he would send the remainder on acknowledgment of receipt of the Rs. 600. After sending for and getting a sample of signature of the sender to verify his signature thereafter, the bank became insolvent before receiving the remaining Rs. 500:

*Held* that in the absence of a direction to the contrary, the relationship between the bank and the person in the circumstances of the case was only that of banker and customer, that it was not of a fiduciary character with regard to Rs. 600, and that, therefore, the sender was only entitled to rank as a creditor just like other creditors of the insolvent bank.

*Downing* instructed by *Branson and Branson* for Official Assignee.

*K. Ramanatha Shenai* instructed by *C. Vijiaraghavalu Naidu* for respondent.

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*Munro* J.
*Sankaran Nair* J.
1907 *July* 21.
Crl. Revn. 9 of 1908.

*S.* 145, *Cr. P. C.—Delivery of possession by Civil Court—Finding by Magistrate that no real delivery was made—Revision.*

Their Lordships declined to interefere in revision with an order under S. 145, Cr. P. C., wherein the Magistrate found that the petitioner though put in constructive possession of the land under a decree of a Civil Court was not put in actual possession and declared the counter-petitioner to have been in possession.

[*Gulraj* v. *Sheik*[1] distinguished.]

*P. R. Sundara Aiyar* and *C. V. Anantakrishna Aiyar* for petitioner.

*Swaminadhan* and *Ramasami* for respondent.

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*Sankaran Nair* J.
*Abdur Rahim* J.
1908 *August* 4.
L. P. A. 8 of 1908.

*C. P. C.*, *Ss.* 103, 108, 157—*Exparte judgment—Previous exparte judgment set aside.*

There can be an *ex parte* judgment at an adjourned hearing even after a previous *ex parte* order is set aside.

*T. R. Venkatarama Sastri* for appellant.

*K. Narayana Row* for respondent.

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*Sankaran Nair* J.
*Abdur Rahim* J.
1908 *August* 5.
C. M. S. A. 67 of 1907.

*Decree—Exonerated defendants—S.* 244, *C. P. C.—Whether parties to the suit.*

Even those defendants who are not made liable under a decree are parties to the suit for purposes of S. 244, C. P. C.

*V. Krishnasawmi Aiyar* and *C. V. Ananta Krishna Aiyar* for appellant.

*S. Venkatachariar* for respondent.

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1. (1905) I. L. R. 32 C. 796.
2. (1899) I. L. R. 23 M. 361. (F. B.)

*Sankaran Nair* J.
*Abdur Rahim* J.
1908 *August* 6.
C. M. S. A. 40 of 1907.

*Decree—Correction of mistake not for the executing Court—Payment at so much a year—Certain and executable.*

The decree in the case was for past and future wages till payment at so much a year. The lower Court refused to execute the decree as to future wages holding that the provision as to future wages must have been made by clerical mistake, holding also that the decree inasmuch as it mentioned no date for payment was not executable. *Held*: Executing Courts are bound to execute the decree as they find it; they have no power to go behind the express directions in the decree. The direction to pay so much every year is sufficiently specific and amounts to a direction to pay at the end of the year for which the wages are due.

*C. V. Ananthakrishna Aiyar* for appellant.

*T. R. Krishnasawmy Aiyar* for respondent.

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*Miller* J.
*Abdur Rahim* J.
1908 *July* 29.
S. A. 1425 of 1908.

*Repudiation of liability under Kurikarar by one of the proprietors—Contract terminable at the option of the subscriber—Proprietor's right not transferable.*

Repudiation by one of the two proprietors of a Kuri of all future liability under the Karar gives the subscriber the right to put an end to the contract altogether; repudiaton in order to have that effect need not be by both.

The right of the proprietor of a Kuri is not transferable, the contract being by its nature one of a personal kind.

*V. Krishnasawmy Aiyar* for appellant.

*P. R. Sundara Aiyar* for respondent.

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*Miller* J.
*Abdur Rahim* J.
1908 *July* 30.
S. A. 563 of 1905.

*Malabar Law—Allotting lands for maintenance—Cancelling the arrangement without substituting other arrangement—Bad.*

The previous Karnavan of a Malabar tarwad had made a provision for the maintenance of a female member by allotting certain lands to her. The present Karnavan sued the tenants for the recovery of some of those lands, making the lady also a party. *Held*: He was not so entitled. It is not open to the Karnavan to sue for the lands piecemeal without even alleging that he has terminated the previous arrangement and given notice of the same to the lady. It is not open to him to terminate the arrangement either without substituting some other arrangement, even though that other arrangement might be one requiring the lady to have her maintenance at the family tarwad.

*J. L. Rosario* for appellant.

*C. Madhavan Nair* and *P. R. Sundara Aiyar* for respondent.

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*Miller* J.
*Abdur Rahim* J. } S. A. 1141 of 1905.
1908 *July* 29.

*False statements as co-defendant—No estoppel as between them.*

Plaintiff sued the defendant (vendor) as his tenant; the defendant pleaded that the sale was a colorable one. The District Judge refused to go into the evidence on this question because the defendant had deposed in a previous suit to which both the plaintiff and the defendant were parties as co-defendants that the sale was true and also because in another suit, in which also they were co-defendants, there was a recital that the latter was the tenant of the former. *Held*: there was no estoppel precluding the defendant from showing the real nature of the transaction, admitedly there having been no fraud perpetrated on anybody.

*C. Ramachendra Rao Saib* for appellant.

*K. Narayana Rao* for respondent.

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## NOTES OF RECENT CASES.

*Chief Justice.*
*Sankaran Nair* J.
1908 *Aug.* 17.
} O. S. A. 38 of 1907.

*S.* 295, *C.P.C.—'Same judgment-debtor.'*

The words "same judgment-debtor" in S. 295, C. P. C., mean the judgment-debtor in the case in execution of the decree in which the assets are realised, and not the same judgment-debtor with reference to attaching creditors alone.

*G. Krishnaswmi Aiyar* for appellant.

*P. M. Sivagnana Mudaliar* for respondent.

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*Munro* J.
1908 *Aug.* 14.
} Cr.R.P. 22 of 1908.

*Set off—S.* 246, *C. P. C.—The larger decree exeecutable at the date of the smaller decree—Barred since—Set-off inadmissible.*

The petitioner obtained a decree against the respondent. Some months after, the respondent obtained a decree in the same court against the petitioner for a smaller amount. More than 3 years after the first decree, but within that time from the second decree, the respondent sought to execute his own decree, The petitioner objected, claiming a set-off under S. 246. *Held*: Petitioner was not entitled to a set-off under S. 246, C. P. C.

*B. Sitaram Rao* for petitioner.

*S. Venkatachari* for respondent.

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*Munro* J.
1908 *Aug.* 14.
} C.R.P. 12 of 1907.

*Suit between landlord and tenant—Lease unregistered—Decree only for admitted rent.*

Plaintiff sued the defendant, a Mulgeni (permanent) tenant, for rent at the stipulated rate. The lease-deed, however, was an

unregistered one. The defendant admitted the tenancy but disputed the rate of rent, claiming to hold at a lower rent.

*Held*: A decree could be given only for the admitted amount. No secondary evidence is admissible to prove the terms of the tenancy as to rent.

*K. Ramanath Shenoi* for petitioner.

*C. Madhavan Nair* for respondent.

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*Miller* J.
1908 *Aug.* 24. } C. R. P. 643 of 1907.

*Landlord and tenant—Contract as mamool wet—No contract to pay water tax—New imposition of water tax by Government—Liability of landlord and tenant to pay half and half.*

Where a tenant was let into possession of certain zemindari lands on the footing that the lands were mamool wet and the Government afterwards imposed water tax thereon declaring them not to be mamool wet:

*Held* that the zemindar and the tenant must pay the water tax thereon half and half.

[S. A. 1247 of 1905 followed].

*V. Ramesam* for petitioner.

*P. Nagabhushanam* for respondent.

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*Miller* J.
*Pinhey* J.
1908 *Aug.* 24. } C. M. A. 243 of 1907.

*S.* 283, *C. P. C.—Suit to establish the subsistence of a mortgage for Rs.* 16,000—*Attachment for Rs.* 2,000—*Jurisdiction—Plaint.*

Where the object of a suit under S. 283, C. P. C., is to establish the subsistence and validity of the claim without seeking to set aside totally the attachment as in a case where the claimant claims that the property is not the property of the judgment-debtor at all, the value of the suit is the value of the claim and not that of the attachment.

*T. Rangachari* for appellant.

*T. Rangaramanuja Chariar* for respondent.

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*Miller* J.
*Pinhey* J.
1908 *Aug.* 25.
C. M. A. 157 of 1907.

*C. P. C., S.* 396—*Only discretion to appoint a commissioner—Decree not necessarily a preliminary decree until a commissioner is appointed.*

It is not always incumbent upon a Court to appoint a commissioner to divide the properties by metes and bounds under S. 396, C. P. C. The Court has got a discretion.

It is impossible to hold that in every case in which a commissioner could be appointed under S. 396, C. P. C., a decree is a only a preliminary decree until a commissioner is appointed.

*T. R. Ramachandra Aiyar* for appellant.

*L. A. Govidaraghava Aiyar* and *A. Ramachandra Aiyar* for respondents.

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*Miller* J.
*Pinhey* J.
1908 *Aug.* 26.
Reference 6 of 1908.

*Prov. Sm. C. C. Act, Art.* 35 (*j*)—'*Distress or attachment*'—*Impounding of cattle.*

Impounding of cattle is neither distress nor attachment within the meaning of Art. 35, Cl. (*j*) of the Prov. Sm. C. C. Act, and so a suit for damages for wrongful impounding of cattle may be a small cause suit.

*Petetioner* not represented.

*G. S. Ramachandra Aiyar* for counter-petitioner.

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*Sankaran Nair* J.
*Abdur Rahim* J.
1908 *Aug.* 26.
C. M. S. A. 87 of 1907.

*Hindu Law—Widow's right of residence—Not attachable in execution of a decree against her personally.*

A widow's right of residence is personal and is not attachable in execution of a decree against her.

*T. V. Seshagiri Aiyar* for appellant.

*G. S. Ramachandra Aiyar* for respondent.

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*Sankaran Nair* J.
*Abdur Rahim* J. } C. M. A. 8 of 1908.
1908 *Aug.* 5.

*Possession on payment within 3 months—Decree—Effect of.*

The plaintiff sued to set aside a sale and for possession. Decree was given to him subject to payment by him within three months of the consideration money. *Held*: Payment within 3 months was not a condition precedent to delivery of possession. Payment could be made at any time.

*S. Venkatacharier* for appellant.

*Respondent* not represented.

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*Sankaran Nair* J.
*Abdur Rahim* J. } C. R. 190 of 1908.
1908 *Aug.* 11.

*Stay of proceedings—Cr. case—Result of proceedings under S.* 476*—Charter Act.*

The High Court has jurisdiction to stay proceedings in a criminal case launched as a result of proceedings under S. 476 when the matter in respect of which the prosecution is launched (here the genuineness of a document) is under consideration before an appellate Court. The discretion is also properly exercised in such cases in staying the proceedings in the criminal Court.

*T. R. Venkatrama Shastry* for petitioner.

*The Public Prosceutor* (*K. Narayana Rao*) for the petitioner.

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*Miller* J.
*Abdur Rahim* J. } L. P. A. 64 of 1908.
1908 *Aug.* 28.

*Letters Patent, S.* 85*—Refusal to grant bail—Whether judgment—Non-appealability.*

Order refusing to grant bail is not a judgment and it is also made in a criminal trial and no appeal lies.

*T. Rangachari* for appellant.

*Nugent Grant* (*Ag. Crown Prosecutor*) contra.

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*Miller* J.
1908 *Aug.* 21. } C. R. P. 707 of 1907.

*Pro-note—Acknowledgment—What is it?*

A promissory note bore an entry at the foot by the debtor in the following terms: " towards principal and interest of the said note, received on" (an earlier date than the date of the entry) signed by the debtor:

*Held*—This amounts to an acknowledgment of liability within the meaning of S. 19 of the Limitation Act.

*T. M. Krishnasamy Aiyar* for *T. Subrahmanya Aiyar* for petitioner.

*V. Purushottam Aiyar* for respondent.

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*Miller* J.
*Abdur Rahim* J.
1908 *Aug.* 25. } S. A. 1245 of 1907.

*Landlord and tenant—Mulgeni tenant—Enhanced assessment—Landlord to pay.*

As between the mulgeni tenant and the landlord the latter is bound to pay the enhanced assessment though the enhancement might have been the result of improvements effected by the tenant.

*K. Ramanatha Shenoi* for appellant.

*K. Narayana Rao* for respondent.

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*Chief Justice.*
*Sankaran Nair* J.
*Pinhey* J.
1908 *Aug.* 25. } S. A. 1268 of 1905.

*S.* 156, *District Municipalities Act—Notice—Limitation—Suits for injunction.*

S. 156 of the District Municipalities Act does not include suits for injunction; consequently neither the provision as to notice nor the six months' limitation prescribed by Cl. (3) of the section applies to such suits.

*T. V. Sheshagiri Aiyar* for appellant.

*K. Ramachandra Aiyar* for respondent.

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*Chief Justice.*
*Sankaran Nair* J.
*Pinhey* J.
1908 *Aug.* 10.

S. A. 480 of 1905.

***Wrongful attachment as judgment-debtor's property—Claim—Sale and distribution of sale proceeds—Cause of action for the claim on the date of attachment.***

Defendants 1 to 3 attached before judgment certain crops belonging to the 5th defendant. Plaintiff put in a claim. The claim was disallowed. The plaintiff sued for a declaration that the property was his, and succeeded. In the meanwhile, defendants 1 to 3 got a decree, had the crops sold, and the money was distributed between defendants 1 to 3 and the 4th defendant another decree-holder. Plaintiff sued for the recovery of the money paid over to the defendants 1 to 3 and 4.

*Held* by the *Chief Justice* and *Pinhey* J. (*Sankaran Nair* J. dissenting) that Art. 29 applied and the cause of action arose on the date of the wrongful attachment.

*T. V. Sheshagiri Aiyar* for appellant.

*V. Ramesam* for respondent.

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*Munro* J.
*Abdur Rahim* J.
1908 *Aug.* 26.

C. M. A. 83 of 1907.

*S.* 492, *C. P. C.*—***Injunction—Jurisdiction for suit not competent.***

An order granting a temporary injunction cannot be impeached on appeal on the ground that the Court had no jurisdiction to try the suit.

*P. Narayanamurthi* for appellant.

*P. R. Sundara Aiyar* for respondent.

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*Munro* J.
*Abdur Rahim* J.
1908 *Aug.* 27.

S. A. 1354 of 1905.

***Charge in an award—Persons not parties to the reference—Not available.***

The defendant's mother owed a debt to the plaintiff. There was a reference among the members of the defendant's family with a view partition and there was a dispute whether the plaintiff's

debt was due from the family. In the award (which was subsequently made a decree of Court) it was provided that this debt was to be paid to this plaintiff on the responsibility of this defendant's share.

*Held*: the plaintiff could not take advantage of the charge in the award; she was not a party to the reference; the charge was not intended for her benefit; nor was the creation of a charge for her benefit within the scope of the reference.

*B. Sitarama Rao* for appellant.

*K. N. Aiya* for respondent.

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*Sankaran Nair* J.<br>*Abdur Rahim* J.<br>1908 Aug. 26. } S. A. 579 of 1905.

*Salt Act*, *S.* 87—*Breach of contract for transport of salt—Suit for, not within.*

A claim against the Secretary of State for damages for breach of a contract for transport of salt is not bad because it is not brought within the period of limitation allowed by S. 87, Salt Act. The damages claimed could not be said to be for acts done under the provisions of that Act so as to bring the case within S. 87 of the Act.

*T. V. Sheshagiri Aiyar* for appellant.

*Ag. Government Pleader* (*K. Narayana Row*) for respondent.

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*Munro* J.<br>*Abdur Rahim* J.<br>1908 *Aug.* 26. } C. R P. 186 of 1907.

S. 108, *C. P. C.*—"*Decree*"—*Decree against the person seeking to set aside—Common ground no ground to set aside against all.*

Plaintiff got an *ex parte* decree against three defendants personally and as managers of a Devaswom. On the application of the third defendant, the Court set aside the whole decree. *Held*: the order of the lower Court was bad in so far as it set aside the personal decree against defendants 1 and 2. The word "decree" in S. 108, C. P. C., only means "decree" against the person seeking to set aside the *ex parte* decree. Although, in some cases, the

Court could not help setting aside the whole decree as a consequence of the decree against one being set aside (as in this case, the decree against the Devaswom) the Court could not set aside the decree against all the defendants simply on the ground that the decree proceeds upon a common ground or is in respect of the same cause of action.

*V. Ryru Nambiar* for petitioner.

*B. Sitarama Rao* for *C. V. Anantakrishna Aiyar* for respondent.

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*Miller* J.
*Pinhey* J.
1908 *Aug.* 28.
C. M. A. 50 and 51 of 1907.

*S. 368, C. P. C.—Alleged legal representative—Not to be brought on record—Against the will of the plaintiff.*

Under S. 368, C. P. C., the Court cannot bring on record a person claiming to be the legal representative of the defendant against the will and without the consent of the plaintiff.

*T. V. Seshagiri Aiyar* for appellant.

*T. V. Muthukrishna Aiyar* for respondent.

## NOTES OF RECENT CASES.

*Munro* J.
*Rahim* J.
1908 *Sept.* 18. } S. A. 323 & 324 of 1905.

*C. P. C., S. 626—No reasons stated for granting review—Illegality—Decree on review liable to be set aside.*

An order granting a review, without stating any reasons as required by S. 626, C. P. C., is illegal and must be set aside.

*T. Rangachari* for appellant.

*Advocate-General (P. S. Sivaswami Aiyar)* for respondent.

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*Munro* J.
*Rahim* J.
1908 *Sept.* 3. } S. A. 960 of 1905.

*Memo. of Objections as to costs—Court Fees Act, S. 16—Necessity to pay Court fee.*

Court fee must be paid even on a Memorandum of Objections which relates to costs alone.

*Advocate-General (P. S. Sivaswami Aiyar)* for appellant.

*T. V. Seshagiri Aiyar* for respondent.

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*Chief Justice.*
*Sankaran Nair* J.
1908 *Sept.* 9. } O. S. A. 7 of 1907.

*Power of attorney to execute mortgage deed—Equitable mortgage—No right to create.*

A power of attorney to execute a mortgage deed does not empower the creation of an equitable mortgage of the property.

*K. Ramachandran* for appellant.

*V. V. Srinivasa Aiyangar* for respondent.

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*Sankaran Nair* J.
1908 *Sept.* 10. } C. R. P. 158 of 1908.

*Registered rental agreement by lessee—No document of lease by the lessor—Suit for rent—Maintainability.*

A suit for rent on a rental agreement executed by the lessee, though no lease was executed by the lessor, is maintainable.

[*Turof Sahib* v. *Esuf Sahib*[1] distinguished.]

*K. Balamukunda Aiyar* for petitioner.

*A. S. Balasubramania Aiyar* for counter-petitioner.

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*Miller* J.
*Pinhey* J.
1908 *Sept.* 11. } S. A. 1211 of 1905.

*Grant to widow for maintenance—Power to sell, mortgage or give—Absolute estate.*

A grant to a widow of a joint Hindu family, with power to sell, mortgage or give away, without any words of inheritance, was held to give her an absolute estate.

*K. Ramachandra Aiyar* for appellant.

*Advocate-General* (*P. S. Sivaswami Aiyar*) for respondent.

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*Munro* J.
*Pinhey* J.
1908 *Sept.* 15. } Crl. Apl. 341 to 354 of 1908.

*Madras Acts— District Municipalities Act, S.* 191 (2), 196 (6) *—Necessity for two licenses.*

Using a place for any purposes mentioned in S. 191, Cl. (2), of the District Municipalities Act without a license therefor is illegal, though a license for holding a private market in that place was obtained, and S. 166, Cl. (6) cannot be invoked where a license under S. 191, Cl. (2), was applied for but was neither granted nor refused.

*Ag. Public Prosecutor* (*K. Narayana Row*) for appellant (the Crown.)

*J. C. Adam* for accused.

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*Munro* J.
*Pinhey* J.
1908 *Sept.* 15. } Crl. Revn. 235 of 1908.

*I. P. C., S.* 405*—Criminal Breach of Trust— Simple retention of money—No proof of misappropriation.*

In a case of criminal breach of trust it is not sufficient to prove that there was a retention, for a time, of trust money by the

1. (1907) I. L. R. 30 M. 322.

accused without meeting urgent expenses, but the prosecution must also prove that the accused misappropriated the trust money.

*E. R. Osborne* and *T. V. Gopalaswami Mudali* for appellant.

*Ag. Public Prosecutor* (*K. Narayana Row*) for the Crown.

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*Munro* J.
*Pinhey* J.
1908 *Sept.* 17.
} Crl. Revn. 295 of 1908.

*I. P. C., S. 499—Defamation—Absolute privilege—Party instructing pleader to put defamatory question to witness.*

A party instructing his pleader to put a question to a witness defamatory of him is absolutely privileged, and is not liable for a prosecution for defamation.

[*Manjaya* v. *Sesha Shetti* [1] and *In re Alarja Naidu* [2] followed.]

*Govinda Marar* for petitioner.

*Ag. Crown Prosecutor* (*Nugent Grant*) for the Crown.

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*Chief Justice.*
*Rahim* J.
1908 *Sept.* 17.
} S. A. 1479 of 1908.

*Suit in ejectment—Defendant trespasser—Fradulent revenue sale—Purchase by defendant—Suit without setting aside—Not maintainable.*

A suit in ejectment against a trespasser who is alleged to have become the purchaser in a revenue sale by bringing it about by suppressing the revenue proclamation or sale, etc., in collusion with the revenue authorities, is not maintainable until the revenue sale is set aside.

*P. Narayana Murthi* for appellant.

*P. S. Subramania Aiyar* for respondent.

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*Miller* J.
*Sankaran Nair* J.
1908 *Sept.* 18.
} S. A. 17 of 1906.

*Suit for exclusive possession on the footing of previous partition—Finding of no division—Granting of relief for joint possession.*

In a suit in ejectment by one member of a family against others on the finding that one of the properties was kept in common

1. (1888) I. L. 11 M. 477.  2. (1906) I. L. R 30 M. 222.

by the members of the family at a partition, the High Court gave a decree for joint possession of the same though there was no such prayer.

*V. Viswanatha Sastri* for appellant.

*V. V. Srinivasa Aiyangar* for respondent.

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*Munro* J.
*Abdur Rahim* J.
1908 *Sept.* 10.
} S. A. 1273 of 1905.

*Limitation Act, S.* 19—*Acknowledgment—Promise to compare accounts.*

The plaintiff sent in a bill to the defendant stating what was due to him from the defendant in respect of their mutual dealings and also requiring the defendant to pay up the balance. The defendant answered by saying that "he should compare accounts." *Held*: it was a sufficient acknowledgment to bring it within the ruling of their Lordships of the Privy Council in *Maniram Seth* v. *Seth Rupchand.*[1]

*V. Ramesam* for appellant.

*P. Nagabhushanam* for respondent.

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*Munro* J.
*Abdur Rahim* J.
1908 *Sept.* 11.
} S. A. 1308 of 1905.

*Alternative claim—Primary relief allowed—On appeal, other relief awardable without Memo. of Objections.*

Plaintiff sued for the recovery of some property which he alleged was purchased for him benami by the defendant out of moneys advanced by him and in the alternative for the money so advanced by him. The Court of First Instance decreed the claim for possession. On appeal, the District Court reversed the decree for possession but gave instead a decree for money, though there was no Memo. of Objections by the plaintiff.

*Held*: the relief as to possession being the primary relief, the plaintiff was not entitled to put in a Memo. of Objections. The Court was, therefore, entitled to pass a decree in plaintiff's favour for money without any Memo. of Objections before it.

*T. R. Ramachandra Aiyar* for appellant.

*V. C. Seshachariar* for respondent.

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1. (1906) I. L. R. 33 C. 1047.

*Munro* J.
*Abdur Rahim* J. } S. A. 1039 of 1905.
1908 *Sept.* 7.

*First a usufructuary mortgage, then a simple mortgage—Suit for sale subject to the first mortgage, good.*

There was first a usufructuary mortgage and then a simple mortgage in favour of the same person. There were some years yet to run for the usufructuary mortgage.

*Held*: The mortgagee could sell subject to his own usufructuary mortgage.

*Advocate General* (*P. S. Sivaswamy Aiyar*) for appellant.

*P. Panchapagesa Sastriar* for respondent.

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*Chief Justice*
*Abdur Rahim* J. } S. A. 1431 and 1432 of 1905.
1908 *Sept.* 23.

*C. P. C., S.* 491—*Attachment before judgment on insufficient grounds—Suit for compensation—Special damages awarded—General damages also can be awarded—Costs—Withdrawal of Memo. of Objections.*

Not only special damages but general damages also, as for loss of credit, can be awarded in a suit for compensation for attachment before judgment based upon insufficient grounds.

The appellant is entitled to his costs on the Memo. of Objections when it is not moved or stamped by the respondent.

*Sir V. Bashyam Aiyangar* and *T. V. Muthukrishna Aiyar* for appellant.

*P. R. Sundara Iyer* and *A. S. Balasubramania Aiyar* for respondent.

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*Miller* J.
*Sankaran Nair* J. } S. A. 1485 of 1905.
1908 *Sept.* 23.

*Dancing girls—Partition—Right to.*

A dancing girl is not disentitled to partition of properties jointly acquired by herself and her sisters simply because the acquisitions were the result of an immoral trade carried on by all of them.

*A. S. Balasubramania Aiyar* for appellant.

Respondent *not represented.*

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*Miller* J.
*Sankaran Nair* J.
1908 *Sept.* 25.

C. R. P. 81 of 1908.

*Presidency Small Cause Court—Appeal to Full Bench not made—C. P. C., S. 622—No revision before High Court—Practice.*

Where an aggrieved party in a suit in a Small Cause Court in the Presidency Town could have appealed to a Full Bench of that Court no revision under S. 622 can be entertained by the High Court.

*E. R. Osborne* instructed by *Orr, David and Brightwell* for petitioner.

*Odgers* instructed by *Grant and Greatorex* for respondent.

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*Miller* J.
*Sankaran Nair* J.
1908 *Sept.* 21.

C. M. A. 231 of 1907.

*C. P. C., S.*, 562-566—*Decision not on a preliminary point—Procedure for appellate court.*

A decision of the Munsif in a suit for rent, that a plea stated, even if true, was unsustainable in law, is not a decision on a preliminary point. The Appellate Court should, under the circumstances, act under S. 566, C. P. C.

*S. Srinivasa Aiyangar* for appellant.

*S. Venkatachariar* for respondent.

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*Munro* J.
*Abdur Rahim* J.
1908 *Sept.* 2.

Cr. R. C. 213 of 1908.

*Sanction—S.* 197, *Cr. P. C.—Village Magistrate not subordinate to Sub-Magistrate as such.*

A Sub-Magistrate has no authority to give sanction for an offence committed before a Village Magistrate because in his capacity as a Village headman he is subordinate to the Sub-Magistrate as Deputy Tahsildar.

*Ag. Public Prosecutor* (*K. Narayana Rao*) and *L. A. Govindaraghava Aiyar* in support of the reference.

*T. Prakasam* for counter-petitioner.

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*Miller* J.
*Pinhey* J.
1908 *Sep.* 2.

Cr. R. P. 298 of 1908.

*S.* 476, *Cr. P. C.—Person not a party or winess—Proceedings against.*

The Court can take proceedings under S. 476, Cr. P. C., against a person who is not before it either as a witness or as a party, but who appears to the Court in the course of a judicial proceeding to have committed an offence of abetting the making of a false claim.

*S. Swaminathan* for petitioner.

*J. L. Rosario* for Public Prosecutor.

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*Miller* J.
*Pinhey* J.
1908 *Sep.* 23.

C. R. P. 10, 11, 12 of 1908.

*Court of Wards Act—Usufructuary mortgagee—Pro-note taken by the Court of Wards from a tenant for kist, on release, vests in the mortgagee.*

A pro-note taken by the Court of Wards from a tenant for the kist due from him to the estate of a disqualified proprietor vests, on the release of the estate owing to the death of the ward, in the usufructuary mortgagee from whose possession the estate was taken and who would otherwise be entitled to the rents and profits.

*P. R. Sundara Aiyar* and *A. S. Balasubramania Aiyar* for petitioner.

*A. Tirunarayana Chariar* for respondent.

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*Miller* J.
*Sankaran Nair* J.
1908 *Sep.* 23

S. A. 1454 of 1905.

An alienation by a member of a Hindu family of his undivided share in the family property for past services is an alienation for value and is valid and binding as against the other members. It stands on an entirely different footing from alienations for natural love and affection.

*Advocate General* (*P. S. Sivaswamy Aiyar*) for appellant.

*T. R. Ramachandra Aiyar* for respondent.

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*Munro* J.
*Abdur Rahim* J. } S. A. 971 of 1905.
1908 *Sep.* 29.

*S.* 566, *C. P. C.— Remand contrary to—Illegality.*

An order of remand contrary to the provisions of S. 566, C. P. C., is not an irregularity, but an illegality which could not be cured under S. 578, C. P. C.

*K. Jaganatha Aiyar* for appellant.

*V. Purushotham Aiyar* for respondent.

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*Sankaran Nair* J.
*Pinhey* J. } A. S. No. 44 of 1905.
1908 *Oct.* 13.

*Registration Act—Unregistered partition-deed—Admissibility to prove divided status.*

An unregistered partition-deed is admissible in evidence to show that the family is divided in status though it cannot be used of itself to affect immoveable property.

*V. Krishnasamy Aiyar* and *V. C. Sheshachariar* for appellant.

*Advocate General* (*P. S. Sivaswami Aiyar*) and *T. R. Venkatrama Sastri* for respondent.

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*Munro* J.
*Pinhey* J. } S. A. No. 1226 of 1905.
1908 *Oct.* 13.

*Piritivaru or Purohit cess—Voluntary payment—Length of payment, notwithstanding—Ejusdem generis.*

Payment for no length of time of "Piritivaru" or the Purohit cess would render it other than voluntary and as such irrecoverable as rent.

A clause in a Putta that the tenant "shall have no concern with Palmyra, Date, Babool or other trees" does not cover Mango or other fruit trees.

*P. Narayanamurthi* for appellant.

*V. C. Seshachariar* and *K. Bashyam* for respondent.

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*Miller* J.
*Sankaran Nair* J. } S. A. No. 1454 of 1905.
1908 *Sept.* 23.

Tender of Putta ought to be by all the co-sharers or there

ought to be an apportionment of rent either by suit or by agreement.

*Advocate General* (*P. S. Sivaswami Aiyar*) for appellant.

*T. R. Ramachandra Aiyar* for respondent.

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*Munro* J.
*Abdur Rahim* J.
1908 *Oct.* 9.
} S. A. No. 718 of 1905.

*Court-fees Act—Appeals from redemption decree—Improvements, value of.*

In appeals from redemption decrees, where the question as to the right of redemption is raised in appeal, the appellant need not pay a separate Court-fee on the value of improvements; the right to the value of improvements is only incidental to the granting of redemption.

*J. L. Rosario* for appellant.

*P. R. Sundara Aiyar* and *C. V. Ananthakrishna Aiyar* for respondent.

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*Munro* J.
*Abdur Rahim* J.
1908 *Sept.* 11.
} S. A. Nos. 1022 and 1023 of 1905.

After partition, a Hindu father is not competent to sell or mortgage properties that fell to his son's share at the partition, though the sale or mortgage is in payment of debts incurred before partition and for which the son also is liable.

*S Srinivasa Aiyangar* and *N.R.K. Thathachari* for appellant.

*P. R. Sundara Aiyar* and *S. Gopalasami Aiyangar* for respondent.

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*Miller* J.
*Sankaran Nair* J.
1908 *Sept.* 29.
} C. M. A. 247 of 1907.

*Restitution—Principles of—Payment to one, restitution, if legal, from all.*

Plaintiff got a decree for redemption on condition of paying a large amount for improvements. Plaintiff appealed. Pending the appeal he deposited the amount in Court to the credit of the 1st defendant who was the *karnavan* of the defendants' family. Owing to disputes between the defendants, by an order (to which the plaintiff and the defendants were parties) the Court directed the amount to be deposited in

Messrs. Arbuthnot and Co. On appeal the amount decreed was substantially reduced. In the meanwhile there was a failure of Messrs. Arbuthnot & Co. The lower Court directed restitution to the plaintiff. *Held*: the defendants not having had the benefit of the money it was not a proper case for the exercise of the discretion under S. 583. The parties ought to have been left to a suit. It was also doubtful if the Court could direct restitution from all the defendants when the payment was made to only one of them, though that one might be the *karnavan* of the family of the defendants.

*P. R. Sundara Aiyar* and *C. V. Ananthakrishna Aiyar* for appellants.

*Advocate General* (*P. S. Sivaswamy Aiyar*), for respondent.

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*Miller* J.
*Sankaran Nair* J.
1908 *Sept.* 28.

C. M. A. 262 of 1907.

*Arts.* 178, 179—*Limitation Act*—*S.* 318 *C.P.C.*—*Decree-holder purchaser*—*Application for delivery of property purchased.*

An application by a decree-holder for delivery of property purchased by him in execution of his decree is governed by Art. 178 and not 179 of the Limitation Act.

*T. R. Venkatarama Sastri* for appellant.

*K. Srinivasa Aiyangar* for respondent.

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*Munro* J.
*Abdur Rahim* J.
1908 *Oct.* 6.

C. M. A. 105 of 1908.

*C P.C.*, *S* 353, 588—*What is the debt.*

In calculating the amount of debt due to a creditor under S. 353, C.P.C., a set-off under S. 247 can be allowed and the balance is to be treated as debt and an appeal under S. 588, C.P.C., lies from any order on the subject.

*K. Ramanatha Shenoi* for appellant.

*K. P. Krishna Menon* for respondent.

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## NOTES OF RECENT CASES.

*Chief Justice.*
*Abdur Rahim J.* } S. A. 1262 of 1905.
1905 *Oct.* 8.

*Partnership—Suit by one partner against others for enforcement of a term in partnership agreement—Maintainability.*

*A* and *B* were parters in a trade, two of the terms of the partnership being that *A* was to supply capital and *B* was to be only a working partner and to cash cheques and hand over the money to *A* on cashing.

*Held*: that *A* can maintain a suit to compel *B* to cash a particular cheque and to pay the proceeds to himself, without filing a suit for dissolution of partnership.

*K. Srinivasa Aiyangar*, *V. Ramesam* and *P. Narayana Murthi* for appellant.

*T. V. Seshagiri Aiyar* for respondent.

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*Munro* J.
1908 *Oct.* 13. } S. R. 4105 of 1908 in S. A. 133 of 1908.

*C. P. C., S.* 82—*Substituted service—No petition necessary—Affidavit sufficient.*

Accepting the argument that no petition is necessary for substituted service and that an affidavit alone is sufficient, his Lordship Mr. Justice Munro ordered substituted service upon a mere affidavit.

*K. R. Krishnaswami Aiyangar* for appellant.

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*Sankaran Nair* J.
1908 *Oct.* 21. } Cr. R. C. 299 of 1908.

*Receipt of stolen goods—Different thefts, different offences—Finding in a house, no evidence of possession against all members of the house—Statement of thief, not witness, inadmissible.*

*Held*: receipt of goods stolen on different occasions is, in respect of each theft, a distinct offence. Held also: finding of stolen goods in a house is not, without anything more, evidence of possession against every member in the house.

*Held also*:—The statement by the thief that he had stolen the goods is inadmissible against a person charged with the

receipt of those goods unless the thief is himself a witness in the case.

*E. R. Osborne* for accused.

*S. Swaminathan* for *Public Prosecutor* for the Crown.

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*Pinhey* J.
1908 *Nvo.* 4. } C. R. P., 343 & 344 of 1908.

*Contract Act, S.* 69.—*Right of suit—Arrears of Government revenue—Paid by reversioner—Recoverable from the widow.*

A reversioner paying arrears of Government revenue in order to save the estate from sale, is entitled to recover the same from the widow in possession.

*G .S. Ramachandra Aiyar* for petitioner.

Respondent *unrepresented.*

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*Miller* J.
*Abdur Rahim* J.
1908 *Nov.* 6. } C. M. S. A. 11 of 1908.

*Held*:—Impartible property in the hands of a successor is assets for the payment of the decree-debts of the predecessor and can be proceeded against in execution.

*Held also*:—No second appeal lies against an order passed in appeal from an order appointing a receiver though the objection to the appointment of the receiver was based upon an objection as to the validity of the attachment.

*C. V. Anantakrishna Aiyar* for appellant.

*The Advocate General* (*P. S. Sivaswamy Aiyar*) for respondent.

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*Munro* J.
*Pinhey* J.
1908 *Oct.* 29. } Cr. R. C. 404 of 1908.

*Discharge—Action 'suo motu' by Magistrate.*

When an order of discharge is passed, there is nothing in law to prevent a magistrate from acting afresh on the same complaint *suo motu.*

*The Public Prosecutor* in support of the reference

Accused *unrepresented.*

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*Munro* J.
*Pinhey* J.
1908 *Oct.* 29. } C. M. A. 164 of 1907.

*Suit valued above* 5000 *Rupees—Order under S.* 359, *C. P. C.,—Appeal lies to the District Court and not to the High Court.*

Appeals from orders passed under S. 359, C. P C., lie to the District Court irrespective of the value of the suit in the course of which the orders were passed. [I. L. R. 17 M. 377 disented from.]

*T. R. Ramachandra Aiyar* for appellant.

*K. P. M. Menon* for respondent.

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*Munro* J.<br>*Rahim* J.<br>1908 *Oct.* 7. } S. A. 964 of 1905.

*Limitation Act, Art.* 102—" *Wages* "—*Interest on emoluments in kind—Not claimable.*

Emoluments of a hereditary office are not wages within the meaning of Art. 102 of the Limitation Act, and interest is not awardable on arrears of emoluments payable in kind.

*S. Srinivasa Aiyar* for appellant.

*T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar* for respondent.

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*Miller* J.<br>*Rahim* J.<br>1908 *Nov.* 6. } C. R. P. 724 of 1907.

*C. P. C., S.* 234—*Dissolved Limited Company—Whether Manager legal representative.*

A Manager of a Limited Company against whom, in his capacity as Manager, a decree for money is passed, is not, after its dissolution, its legal representative for purposes of execution.

*T. V. Muthukrishna Aiyar* for *K. Srinivasa Aiyangar* for petitioner.

*A. S. Balasubramania Aiyar* for respondent.

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*Miller* J.<br>1908 *Nov.* 5. } C. R. P. 20 of 1908.

*Religious Endowments Act, Ss.* 14, 18—"*A perusal of allegations in petition*"—*Enquiry into bonâ fides competent.*

It is not incompetent for a District Judge, in a petition under S. 14 of the Religious Endowments Act, to make an enquiry into the *bona fides* of the petition in addition to perusing the allegations contained therein.

*K. Srinivasa Aiyangar* for petitioner.

*Advocate-General* (*P. S. Sivaswami Aiyar*) and *T. Rangaramanujachari* for respondent.

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*Miller* J.
1908 *Nov.* 5. } C. R. P. 330 of 1908.

*C. P. C., Ss.* 542, 543—*Limitation Act, S.* 5.

A memo of appeal was presented out of time with a petition to excuse the delay, and the Court rejected it without passing a judgment or decree. *Held* that S. 543, C. P. C., did not make it obligatory on the Court to reject a memo of appeal only on the grounds mentioned in S. 542; it can reject also on other grounds such as that mentioned in S. 5 of the Limitation Act.

*S. Subramania Aiyar* for petitioner.

*M. K. Narayanaswami Aiyar* for respondent.

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*Chief Justice.*
*Miller* J.
1908 *Nov.* 11. } O. S. A. 40 of 1908.

*Guardian and Wards Act—Preferential relationship not the only ground in determining right to guardianship of person.*

Preferential relationship to a minor is not the only ground in determining one's right to guardianship.

*T. Rangachari, Venkatasubba Row* and *Radhakrishnayya* for appellant.

*C. P. Ramaswami Aiyar* for respondent.

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*Munro* J.
*Pinhey* J.
1908 *Nov.* 17. } S. A. 86 of 1906.

*Hindu Law—Self-acquisition of father—Death of father—Divided and undivided sons—Who inherits.*

On the death of the father an undivided son takes all his self-acquisition by survivorship in preference to a divided son.

*Advocate General (P. S. Sivasawmi Aiyar)* for appellant.

*K. Srinivasa Aiyangar* for respondent.

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## NOTES OF RECENT CASES.

*Abdur Rahim* J.
1908 *Nov.* 20. } Cr. R. C. 347 of 1908.

*I. P. C., S.* 448—*Cr. P. C., S.* 106.

A conviction under S. 448, Penal Code, does not justify binding over under S. 106, Cr. P. C. [29 M. 19 followed (reluctantly, the learned Judge being inclined to agree with 7 C.W.N. 27)].

*C. Kunjunni Nair* for petitioner.

*The Ag. Public Prosecutor* (*K. Narayana Rao*) for the Crown.

*Wallis* J.
*Abdur Rahim* J.
1908 *Nov.* 11. } Cr. A. C. 439 of 1908.

*Cr. P. C., S.* 418—*No appeal after withdrawal.*

There is no appeal under S. 418 against an acquittal on a withdrawal by the Public Prosecutor in Sessions Court.

There is no power in the Court to cross-examine an accused, nor even to examine him when there is no evidence on the record which the accused is to be called upon to explain. A conviction under those circumstances was set aside.

Petitioners *unrepresented.*

*The Ag. Public Prosecutor* (*K. Narayana Rao*) for the Crown.

*Sankaran Nair* J.
*Abdur Rahim* J.
1908 *Nov.* 3. } A. S. 41 of 1906.

*Hindu Law—Partition— Suit for management of family charity by turns.—Not permissible without seeking general partition.*

It is not competent for a member of an undivided Hindu family to sue only for the management of charity property by turns without also seeking for the partition of the other family properties.

*T. Rangachariar* for appellant.

*P. R Sundara Aiyar* and *T. Natesa Aiyar* for respondent.

*Miller* J.
*Sankaran Nair* J. } L. P. A. 23 of 1908.
1908 *Dec.* 1.

*C. P. C., S.* 43—*Suit for ejectment—Subsequent suit for arrears of rent.*

First there was a suit for possession by the landlord against the tenant after proper notice to quit. Subsequently a suit was brought for arrears of rent during the time the tenant was holding the land under the plaintiff. *Held*: S. 43, C. P. C., did not bar the suit.

*M. A. Tirunarayanachariar* for appellant.

*T. V. Muthukrishna Aiyar* for respondent.

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*Wallis* J.
*Abdur Rahim* J } S. A. 970 of 1904.
1908 *Dec.* 2.

*Suit in ejectment—Government's right to maintain—Cowle outstanding—Rights under patta.*

The Government has no right to maintain a suit for possession so long as a cowle granted by it to a private party is outstanding.

The grant under a putta by the Government is *prima facie* absolute and terminable only in the manner provided by the Revenue Recovery Act.

*P. R. Sundara Aiyar* and *C. V. Anantakrishna Iyer* for appellant.

*The Ag. Govt. Pleader* (*K. Narayana Rao*) and *V. Ryru-Nambiar* for respondent.

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*Chief Justice*
*Miller* J. } S. A. 360 of 1905.
1908 *Dec.* 2.

*C. P. C., S.* 11.—*Office—Honors and privileges—Questions of precedence—Jurisdiction of Courts.*

Courts are competent to consider the nature and precedence in respect of honors and privileges when they are inseparably connected with an office, though the right to the office itself may not be questioned.

*R. Sadagopachariar, T. Rangachariar* and *T. Narasimha Aiyangar* for appellant.

*The Advocate-General* (*P. S. Sivaswamy Aiyar*), *T. R. Ramachandra Aiyar* and *T. R. Krishnasamy Aiyar* for respondent.

*Munro* J.
*Sankaran Nair* J. } Cr. R. C. 303 of 1908.
1908 *Dec.* 3.

*Ss.* 145 & 147, *Cr.P.C.—Proceedings under S.* 147 *altered into proceedings under S.* 145—*Notice not given—Illegal.*

Proceedings were started by a Magistrate under S. 147, Cr. P. C., which were subsequently altered into one under S. 145, Cr. P. C. Notice was not sent to the parties of this fact so as to give them an opportunity to put in statements as contemplated by the Code. Nor had they already put in statements appropriate for proceedings under S. 145. *Held*: the order passed under such circumstances was invalid and ought to be set aside.

*E. R. Osborne* and *M. K. Narayanaswamy Aiyar* for petitioner.

*The Ag. Public Prosecutor* (*K. Narayana Rao*) and *S. Srinivasa Aiyangar* contra.

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*Miller* J.
*Munro* J. } C. M. A. 64 of 1908.
1908 *Dec.* 3.

*Guardian for the person of a lunatic—Court's jurisdiction to control—Marriage of the lunatic.*

The Court has jurisdiction to restrain the guardian for the person of a lunatic from marrying the lunatic without the previous order of the Court.

*Joseph Satya Nadar* for appellant.

*R. Rangasamy Aiyangar* for *K. Srinivasa Aiyangar* for respondent.

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*Miller* J.
*Pinhey* J. } S. A. 369 of 1906.
1908 *Dec.* 3.

*Maiden daughter—Inherited property, not stridhana.*

A maiden daughter inheriting the stridhana property of her mother takes only a life estate therein and not an absolute estate. [19 M. 110 followed. 2 M. L. J. 49 dissented from].

*B. Sitarama Rao* for appellant.

*V. Ramesam* for respondent.



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*Munro* J.
*Sankaran Nair* J. } Ref. C. 13 of 1908
1908 *Dec.* 3.

*Estates Land Act, S.* 189—*Effect on suits instituted before.*

After a suit for rent was instituted in the Small Cause Court, (but before the hearing of the suit), the Estates Land Act came into force which prohibited the Civil Courts from taking cognisance of such suit: *Held,* notwithstanding, that the Small Cause Court had jurisdiction to try the suit.

*T. Ranga Ramanujachariar* in support of the reference.

*C. Aiyasamy Sastry* contra.

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*Munro* J.
*Sankaran Nair* J. } S. A. 679 of 1907.
1908 *Dec.* 3.

*Darkhast—Tank-bed land—Public auction, the rule—Assignment in contravention only an irregularity.*

As a result of a *bona fide* mistake on the part of the Tahsildar, patta was granted on darkhast for a portion of tank-bed land in contravention of the Board's standing orders which required that such lands should be sold by public auction. Ten years after, the Collector concelled the patta.

*Held*: it was not open for him to do so. The Tahsildar was the officer authorised to dispose of Government waste lands and the impropriety was only in the manner of the carrying out of the authority. Under such circnmstances, the assignment in contravention of the rules was only an irregularity and did not justify the Collector in cancelling the patta.

*The Ag. Govt. Pleader* (*K. Narayana Rao*) for appellant.

*P. R. Sundara Aiyar* and *P. S. Parthasarathy Aiyangar* for respondent.

## NOTES OF RECENT CASES.

*Miller* J.
*Sankaran Nair* J. } C. R. P. 365 of 1908.
1908 *Dec.* 19.

*C. P. C., S.* 375—*Court competent to investigate question of undue influence.*

Under S. 375, C. P. C., Courts have power to investigate the question whether a compromise was brought about by undue influence and to refuse to give effect to it when it is found that it was so brought about.

*P. R. Sundara Aiyar* for petitioner.

*L. A. Govindaraghava Aiyar* for respondent.

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*Chief Justice*
*Wallis* J. } S. A. 1287 of 1907.
1908 *Dec.* 11.

*Time, essence of contract—Contract for sale of land—Construction.*

A contract for the sale of land provided *inter alia*: "Should you fail to pay me the balance of the purchase-money on the due date the advance shall be forfeited and you shall give up the right to purchase." *Held*, upon the construction of the contract, that time was of the essence of it and the right of specific performance was forfeited by non-payment of the purchase-money on the due date.

*P. Narayanamurthi* for appellant.

*P. Nagabhushanam* for respondent.

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*Chief Justice.*
*Abdur Rahim* J. } A. S. 6 of 1906.
1906 *Dec.* 23.

*Hindu Law—Manager—Adult juniors—No fraud—No right to ask for account.*

The adult junior members of an undivided Hindu family have no right, at the time of partition, to call for an account

from the Manager as to his management, whether in respect of past profits or past transactions, in the absence of fraud or misappropriation.

*V. Krishnasamy Aiyar* and *K. Ramachandra Aiyar* for appellant.

*P. R. Sundara Aiyar* and *G. S. Ramachandra Aiyar* for respondent.

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*Miller* J.
*Pinhey* J.
1908 *Oct.* 29. } C. M. A. 263 of 1908.

*C. P. C., Ss.* 244 (*c*), 287—*Appeal—No mention of order in which to sell items.*

An objection that a proclamation for sale does not contain any reference to the numercial order in which the properties are ordered to be sold by the Judge, is not a matter which can be dealt with under S. 287, C.P.C., and hence the Full Bench judgment in *Sivagami Achi* v. *Subrahmanya Aiyar*[1] holding that there is no appeal, does not apply in such cases. It is a matter which can be dealt with only under S. 244 (*c*) and hence an appeal lies.

*C. Madhavan Nair* for appellant.

*K. Srinivasa Aiyangar* for respondents.

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*Miller* J.
1908 *Dec.* 4. } C. R. P. 168 & 169 of 1908.

*C. P. C., Ss.* 294, 295, 622—*Rateable distribution, grant of—Revision.*

An illegal refusal to grant rateable distribution under S. 295 without any proper grounds can be revised under S. 622, C. P. C. in spite of the existence of another remedy, *viz.*, a regular suit being open to the party where the right is clear and revision is the lesser of the two evils.

*T. R. Venkatarama Sastri* for petitioner.

*V. V. Srinivasa Aiyangar* for respondent.

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*Munro* J.
*Sankaran Nair* J.
1908 *Dec.* 16. } C. M. S. A. 3 of 1908.

*Limitation Act, Art.* 179—*Step-in-aid of execution—Re-presentation of an execution petition is not.*

---

1. (1903) I. L. R, 27 M. 259 F. B.

A re-presentation of an execution petition by making the necessary amendments is not a step-in-aid of execution.

*T. Rangachariar* for appellant.

*The Advocate-General* (*P. S. Sivaswamy Aiyar*) for respondent.

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*Munro* J.
*Sankaran Nair* J. } C. M. S. A. 31 of 1908.
1908 *Dec.* 16.

*C. P. C., S.* 108—*Order setting aside ex parte decree—Costs, order in execution as to—No appeal.*

There is no appeal from an order in execution as to costs made in an order setting aside an *ex-parte* decree, the latter order itself being not appealable.

*K. P. M. Menon* for appellant.

*C. Madhavan Nair* for respondent.

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*Munro* J.
*Pinhey* J. } S. A. 1480 of 1907.
1908 *Dec.* 9

*Transfer of Property Act, S.* 108, *Cl.*(*h*)—*Tenant not entitled to compensation for buildings erected, but only to their removal.*

In a proper suit by a landlord to eject a tenant who had constructed a building on the holding, the latter is only entitled under S. 108, Cl. (*h*), T. P. Act, to remove his building, and not to any compensation.

*C. Narasimhachari* for appellant.

*T. R. Krishnasami Aiyar* for respondent.

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*Chief Justice.*
*Abdur Rahim* J. } Ap. 7 of 1907.
1908 *Dec.* 22.

*Land Acquisition—Amount of compensation—Future probable use cannot be taken into consideration—Costs—Appeal.*

Future probable use to which a land taken under the Land Acquisition Act might be put cannot be taken into account in considering the amount of compensation.

An appeal lies against a wrong exercise of discretion as to costs.

*K. Narayana Rao* (*Ag. Government Pleader*) for appellant (Government).

*A. S. Cowdell* for respondent.

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*Benson* J.
*Miller* J.
1908 *Dec.* 16.
} S. A. 219 of 1906.

*S. 56 (b) Specific Relief Act—No bar where no execution proceedings are pending.*

A suit for an injunction to restrain the defendant from taking actual possession will lie if the defendant in contravention of the plaintiff's authority to pay certain money and avoid a Court sale has purchased and got a sale certificate and order for possession in his own favour. S, 56 (*b*), Specific Relief Act, is no bar where no proceedings in execution are pending in a superior Court.

*T. V Gopalasami Mudaliar* for appellant.

*T. Natesa Aiyar* for respondent.

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*Munro* J.
*Abdur Rahim* J.
1909 *Jan.* 6.
} S. A. 831 of 1905.

*Acknowledgment by one of the heirs of the mortgagee—Act XIV of 1859—Effect of.*

Acknowledgment by one of the heirs of a mortgagee of the mortgagor's right to redeem is not sufficient under Act XIV of 1859 (Limitation Act) to keep alive the mortgagor's right to redeem even in respect of the share of the party acknowledging.

*T. V. Seshagiri Aiyar* and *K. P. Madhava Rao* for appellant.

*J. L. Rosario* for respondent.

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*Benson* J.
*Abdur Rahim* J.
1909 *Jan.* 5.
} S. A. 1443 of 1907.

*Sale by mother and "de facto" guardian—Representation as necessity—Application, found against—No equity.*

The mother and *defacto* guardian of a Mahomedan infan sold the property of the infant ostensibly for purposes binding on the minor. But as a matter of fact, the money was not so applied.

*Held*: The equity, if any, arises only on the application of the money, the guardian of Mahomedan infant having no power under the law to sell the infant's property, and as such the sale was totally invalid.

*T. Prakasam* for appellant.

*P. Nagabushanam* for respondent.

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*Chief Justice.*
*Wallis* J. } S. A. 1162 of 1904.
1909 *Jan.* 5.

*Vendor and Purchaser—Suit by purchaser for possession—Conditional decree, incompetent.*

In a suit for possession by the vendee of an immoveable property it is not open to the Court to make a conditional decree that on plaintiff's paying within so much time the purchase money, the defendant should deliver possession and that in default of such payment the suit should stand dismissed.

*V. Purushottama Aiyar* for appellant.

*T. V. Gopalaswami Mudaliar* for respondent.

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*Chief Justice.*
*Sankaran Nair* J. } S. A. 784 of 1905.
1908 *Feb.* 27.

*Malabar Law—Tavazhi—Gift to a few of the members—Effect of.*

(i) There cannot be a gift to some only of the members of a Tavazhi so as to invest the property with the incidents of impartibility and uncontrolled management which are the incidents of Tarwad property.

(ii) To make the property impartible, it is necessary that the Tavazhi must in effect be a Tarwad with its own property and its own Karnavan.

(iii) The decision in I. L. R. 16 M. 201 (F.B.) is not an authority for the position that the property gifted to a mother and her children becomes impartible and is subject to the uncontrolled management of a single member.

(iv) Joint tenancy other than the joint tenancy of Hindu and Marumakkathayam joint families being unknown to Indian

Law, a gift to a mother and one of her sons, makes them only tenants-in-common, each being presumably entitled to a half.

*V. Ryru Nambyar* for appellant.

*T. R. Ramachandra Aiyar* for respondent.

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*Chief Justice.*
*Miller* J.
1909 *Jan.* 18.

S. A. 1524 of 1905.

*Village Devaswom—Resolution by village meeting, effect of—Suit by managing member on contract—Non-joinder of junior members—Limitation Act, Art.* 75—*Waiver.*

Plaintiff's firm supplied moneys from time to time to the Devaswom belonging to the village of which the plaintiffs and the defendants were members. A meeting consisting of some of the villagers—but after proper notice—resolved that the 1st plaintiff should be paid the amounts due on that date in 3 instalments, on default in respect of any instalment the whole to be payable. Default was committed. The present suit was brought by the 1st plaintiff the managing member alone, but on objection by the defendants, his undivided brother was also made party but by then time had expired for the suit if calculated from the date of the 1st default.

*Held*:—(i) The resolution amounted to a fresh promise; (ii) the members forming the meeting were entitled to acknowledge the debt; a person having authority to contract debts is entitled to acknowledge debts as well; (iii) junior members of an undivided Hindu family are necessary parties even to suits on contracts; (iv) acquiescence on the part of the other members cannot cure the defect of non-joinder; (v) there being no proof of waiver the suit was barred in respect of all the instalments.

*P. R. Sundara Aiyar* for appellant.

*L. A. Govindaraghava Aiyar* for respondent.

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